89-1661

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, AND CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,
Petitioners,

v.

MESA VERDE CONSTRUCTION CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit erred in refusing to retroactively apply the decision of the National Labor Relations Board in *Deklewa v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 282 NLRB No. 184 (1987) contrary to the Board's determination and contrary to the determination of the other Circuits which have considered the question?

2. Whether the decision of the Court below creates an irreconcilable conflict between the National Labor Relations Board and the Courts over employee representation issues normally within the expertise and exclusive jurisdiction of the National Labor Relations Board?

LIST OF PARTIES

The parties to the proceedings below and before this Court are:

1. Northern California District Council of Laborers;

2. Carpenters 46 Northern California Counties Conference Board;

3. Mesa Verde Construction Co.

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The Northern California District Council of Laborers (hereinafter "Laborers Union") and the Carpenters 46 Northern California Counties Conference Board (hereinafter "Carpenters Union") respectfully pray that a Writ of Certiorari issue to review the Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 26, 1990.

OPINIONS BELOW

The Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit after remand from the *en banc* Court (Appendix A, *infra*) is reported at 885 F.2d 594. The Opinion of the *en banc* Court (Appendix B, *infra*) filed November 15, 1988 is reported at 861 F.2d 1124. The Opinion of the original three judge panel of the United States Court of Appeals for the

Ninth Circuit (Appendix C, *infra*) filed June 23, 1987 is reported at 820 F.2d 1006. The Decision of the United States District Court for the Northern District of California (Appendix D, *infra*) filed December 13, 1984 is reported at 598 F. Supp. 1092. The Order of the United States District Court for the Northern District of California denying the Motion for Alteration, Amendment or Vacation of Order (Appendix E, *infra*) filed February 11, 1985 is reported at 602 F. Supp. 327.

JURISDICTION

The Judgment and Opinion of the original three judge panel of the United States Court of Appeals for the Ninth Circuit was entered on June 23, 1987. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed and granted. The Decision of the *en banc* Court reversing the earlier Opinion and remanding the case to the three judge panel to determine the question of retroactivity was filed on November 15, 1988. The Decision of the three judge panel after remand was filed on September 13, 1989. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed on September 27, 1989. On January 26, 1990, the Petition for Rehearing was denied, and the Suggestion for Rehearing *En Banc* was rejected, and the Order of the three judge panel was amended. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c).

STATUTES INVOLVED

The relevant statutory provisions are:

A. National Labor Relations Act, as amended, Section 8(f), 29 U.S.C. § 158(f).

B. Labor-Management Relations Act of 1947, as amended, Section 301, 29 U.S.C. § 185.

Pertinent portions of these statutory provisions are reproduced at Appendix F, *infra*.

STATEMENT OF THE CASE

The Northern California District Council of Laborers and the Carpenters 46 Northern California Counties Conference Board are labor organizations within the meaning of the National Labor Relations Act of 1947, as amended (hereinafter "NLRA"), 29 U.S.C. § 152(d). They exist in whole or in part for the purpose of negotiating and entering into collective bargaining agreements on behalf of themselves and their constituent members.

Mesa Verde Construction Company is an employer primarily engaged in the construction industry within the meaning of § 8(f) of the NLRA, 29 U.S.C. § 158(f).

In 1979 Mesa Verde entered into its first collective bargaining agreement with the Laborers Union and signed an additional collective bargaining agreement with the Laborers Union on June 26, 1980. The contract was to remain in effect until June 15, 1983 and would continue in effect from year to year thereafter absent timely termination under the termination mechanism provided in the agreement. On November 17, 1982, Mesa Verde and the Laborers Union agreed in writing that their 1980 contract would continue in effect until June 15, 1986.

Mesa Verde first entered into a collective bargaining agreement with the Carpenters in August, 1979. Through a subsequent agreement executed in June, 1980, Mesa Verde accepted the new June 16, 1980 to June 15, 1983 Carpenters Master Agreement. On September 8, 1982, Mesa Verde and the Carpenters entered into an early extension of the agreement to June 15, 1986, the *quid pro quo* for such extension being certain concessions by the union limiting wage increases and providing more flexible working conditions for Mesa Verde. The Carpenters' agreement, like the Laborers' Agreement, also contained a termination mechanism.

Both of the collective bargaining agreements contained arbitration provisions. The Laborers agreement provided for arbitration, with certain limited exceptions, of "any dispute concerning the interpretation or application of the agreement." The Carpenters agreement provided for arbitration of "[a]ny dispute concerning the relationship of the parties, any application or interpretation of this Agreement."

Despite the fact that the agreements with both unions were to remain in effect until June 15, 1986, Mesa Verde, by way of letters, informed the unions of its intent to abrogate or repudiate its collective bargaining agreements in May of 1984. At the time of this abrogation, or repudiation, Mesa Verde was working on a project in Hercules, California, at which it employed members of both unions. In late May or early June of 1984, Mesa Verde began work on another project employing non-union workers in contravention of the collective bargaining agreements. Both unions filed grievances against Mesa Verde and requested arbitration over Mesa Verde's contractual obligations on the new project.

Mesa Verde brought suit against both unions seeking a declaratory judgment that it need not comply with the agreements with respect to projects begun after its repudiation in May, 1984. The District Court stayed the arbitrations pending resolution of the declaratory judgment action and later granted Mesa Verde summary judgment against both unions. The Court held that the collective bargaining agreements at issue were "pre-hire" agreements authorized by § 8(f) of the N.L.R.A. and that Mesa Verde's May, 1984 letters were sufficient to effectively repudiate the agreements.

The unions appealed the decision to the Ninth Circuit Court of Appeal. While the appeal was pending, the National Labor Relations Board (hereinafter "the Board") decided the case of *Deklewa v. International Association*

of Bridge, Structural and Ornamental Iron Workers, Local 3, 282 NLRB No. 184, 124 LRRM 1185 (1987). In *Deklewa*, the Board solicited argument and comment from the parties and from *amici curiae* across the country as to the continued viability of the "repudiation doctrine." The Board noted that the law concerning the repudiation doctrine was "unsettled and confusing" and, as a result, "both labor and management across the country were generally united in the desire for changes in existing 8(f) law." (*Deklewa*, *supra*, 124 LRRM at 1198). As a result, the Board held that employers may not repudiate pre-hire collective bargaining agreements authorized by § 8(f) of the NLRA during their term absent a Board-conducted election in which the majority of the employees vote to decertify their union. In addition, the Board ruled that *Deklewa* should be applied retroactively to all cases. (*Id.* at 1198)

The original panel decision in the instant case affirmed the Judgment of the District Court, but invited the Unions to file a Petition for Rehearing *En Banc* to consider whether the rule enunciated by the Board in *Deklewa* should be adopted as the law of the Circuit and applied to actions brought under § 301 of the Labor-Management Relations Act (29 U.S.C. § 185). A Petition for Rehearing *En Banc* was timely filed and granted. The *en banc* Court exhaustively reviewed the Board's decision in *Deklewa* and the legislative history of § 8(f) of the N.L.R.A. and determined that the rules enunciated in *Deklewa* better served the policies of labor stability and employee free choice. Thus, the *en banc* Court adopted the rule in *Deklewa* as the law of the Ninth Circuit, but did not reach the issue of whether *Deklewa* should be applied retroactively. Rather, the *en banc* Court remanded the case to the original three judge panel to determine, under the factors set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), whether *Deklewa* should be applied retroactively.

In the meantime, the Third Circuit and the Eighth Circuit, both of which were considering the same issue, ruled, as did the N.L.R.B., that *Deklewa* should be applied retroactively. See, *International Association of Bridge, Structural and Ornamental Iron Workers v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. den.*, 57 U.S.L.W. 3259 (1989) and *NLRB v. W.L. Miller Co.*, 871 F.2d 745 (8th Cir., 1989). However, the Ninth Circuit panel here issued a split decision refusing to apply *Deklewa* retroactively, thereby creating a conflict in the circuits and a conflict with the Board.

REASONS FOR GRANTING THE WRIT

As a result of the decision below, there is a conflict in the Circuits concerning retroactive appreciation of *Deklewa*. As a result of this conflict, there are scores of cases in the federal courts which have been stayed pending the outcome of this case. This conflict in the circuits can only be resolved by this Court's plenary review.

At issue is whether the Federal Courts are to be burdened for many years to come litigating the complex questions involved in repudiation issues, or whether these issues will be determined by the N.L.R.B., the expert agency vested by Congress with the authority to determine collective bargaining representation issues. It is common knowledge that the federal courts are facing a crisis situation. Many of the federal courts throughout the nation cannot even try civil cases because their dockets are so crowded with criminal actions. See, e.g., "Federal Court Watch Criminal Case Load Brings New Tenor," *Legal Times*, April 2, 1990, p. 7. As a result of the Ninth Circuit's decision in this case, those same dockets are now being overcrowded with employee representation issues, issues which should properly be resolved by the N.L.R.B., not the courts.

Because the decision conflicts with the N.L.R.B.'s retroactive application of the rule enunciated in *Deklewa*, the Ninth Circuit's decision fosters forum shopping and in-

consistent rulings between the Board and the courts. Since labor stability is an issue of national concern, this case affects a rule of national significance where there is an overriding need for uniform application of the nation's labor laws.[1]

If *Deklewa* is not applied retroactively, the rule enunciated therein will be emasculated and will become a nullity. The decision in this case places a legal cloud over all pre-hire agreements entered into prior to the *Deklewa* decision, and severely undermines the objectives of labor stability and employee free choice which the N.L.R.B. sought to achieve in the *Deklewa* decision. Moreover, this is not a problem which will cease to exist in a few years. Rather, as a result of the decision here, every pre-hire agreement entered into prior to the *Deklewa* decision will be vulnerable indefinitely to a repudiation defense.

The Ninth Circuit decision contains three fundamental errors. First, the Court did not address the need for uniform application of the nation's labor laws and the need for labor stability, both of which will be undermined by conflicting decisions between the courts and the N.L.R.B. Second, the Court confused the "right" to repudiate with the "proper method" to effectuate such a repudiation and, therefore, misapplied the *Chevron* factors resulting in a conflict in the circuits. Third, the Court misapplied the equities in this case by rewarding employers who chose to risk repudiating agreements by means other than that provided for in the statute, and by penalizing employees who, through no fault of their own, were denied the opportunity to vote in Board-conducted elections. Only by plenary review by this Court can these problems be rectified.

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[1] Petitioners respectfully urge the Court to invite the filing of an *amicus* brief by the National Labor Relations Board to aid the Court in its consideration of this Petition since the decision below will have an impact on the N.L.R.B. The N.L.R.B. appeared as an *amicus curiae* in this case before the *en banc* Court.

I. FAILURE TO APPLY DEKLEWA RETROACTIVELY WILL RESULT IN INCONSISTENT DECISIONS BEING RENDERED BY THE N.L.R.B. AND THE COURTS, AND WILL OVERBURDEN THE FEDERAL COURT SYSTEM WITH DECISIONS WHICH SHOULD BE MADE BY THE N.L.R.B.

Only by applying *Deklewa* retroactively can uniform application of the nation's labor laws be assured. In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court made clear that when an activity is "arguably subject to § 7 or § 8 of the Act" the states "as well as the federal courts" must "defer to the exclusive competence of the N.L.R.B. if the danger of interference with national policy is to be averted." *Id.* at 245). In addition, this Court has noted that in § 301 lawsuits, the Courts are to enforce collective bargaining agreements in accordance with the federal labor policies developed by the Board. *Howard Johnson Co. v. Hotel Employees Union*, 417 U.S. 249, 256 (1974). Moreover, the usual rule is that cases are to be decided in accordance with the law at the time of the decision. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

Because the Ninth Circuit has refused to follow the federal labor policy developed by the Board with respect to retroactive application of *Deklewa*, the scarce judicial resources of the courts and the resources of the litigants are being overburdened with litigation concerning repudiation issues. In an overwhelming number of cases where a union files a Petition to Compel Arbitration, or a Petition to Confirm an Arbitration Award, or where an employee benefit trust fund files an action to collect delinquent trust fund contributions, the employer raises majority support as a defense.[2] Once such a defense is

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[2] In the context of an action for delinquent trust fund contributions, even permitting the issue to be raised by way of defense is antithetical to the legislative history of § 515 of the Employee Re-

raised, the judicial resources of the courts and the resources of the litigants are diverted from considering the case on the merits to making bargaining unit and majority support determinations, representation questions which, under the primary jurisdiction doctrine, should properly be resolved by the N.L.R.B., not by the courts. See *e.g., South Prairie Construction Co. v. Local 627, I.U.O.E.*, 425 U.S. 800 (1976).

Moreover, failure to apply *Deklewa* retroactively in the § 301 context will simply increase the "morass of confusing evidentiary problems" which led to the "fractious litigation" that the Board and the Ninth Circuit Court *en banc* sought to eliminate by adopting *Deklewa's* nonrepudiation rule. As the *en banc* Court noted here, determining repudiation issues involves a multitude of evidentiary problems. *Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1133-34 (9th Cir. 1988) (*en banc*). Indeed, the Board's recognition of the inherent litigation difficulties in determining repudiation issues was one of the primary reasons for adopting the rule announced in *Deklewa*. The Board noted that the pre-*Deklewa* rule gave rise to serious practical problems dealing with the reliability and relevance of evidence. The determination required that the trier of fact " 'look back' any number of years into a relationship characterized by sporadic and shifting employment patterns to determine whether the union, at any time, enjoyed majority support." (*Deklewa, supra*, 124 L.R.R.M. at 1193). The Board pointed out that the documentary evidence of such factors "is often incom-

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tirement Income Security Act, as amended, 29 U.S.C. § 1145 (1982). The comments of Representative Thomas and Senator Williams in the legislative history of § 515 demonstrate Congressional disapproval of courts allowing employers to raise the defenses of union majority status and repudiation in actions for the collection of unpaid trust fund contributions. *See* 126 Cong. Rec. 23039 and 23288 (1980).

plete, contradictory or unavailable." (*Id.*) These practical difficulties are "compounded when unit determination questions arise" because the appropriate bargaining unit must be determined before a ruling can be made on the effectiveness of the repudiation. (*Id.* at 1193 n.37).

In view of the Ninth Circuit's decision, the courts will have to deal with all of the evidentiary problems which the Board, after many years of administering the repudiation doctrine, determined were overwhelming and not manageable. Thus, in all future cases where repudiation is raised, the Courts will have to determine:

> 1. Whether the Union attained majority status within an appropriate unit; [3]
>
> 2. Whether the appropriate unit is a single-employer unit or whether the unit has merged into a multi-employer unit; [4]
>
> 3. Whether the agreement converted from a § 8(f) agreement into a § 9(a) agreement; [5] and
>
> 4. Whether the employer hired on a job-site-by-job-site basis or on a permanent and stable basis.[6]

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[3] Bargaining unit determinations, however, are within the primary jurisdiction of the N.L.R.B., not the courts. *South Prairie Construction Co. v. Local 627, I.U.O.E.*, 425 U.S. 800 (1976), *supplemented*, 231 N.L.R.B. No. 13, 95 L.R.R.M. 1510 (1977); *Carpenters Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1278 (9th Cir., 1984).

[4] The N.L.R.B., however, has abolished the merger doctrine which was a Board-created doctrine. See *Deklewa*, 124 L.R.R.M. At 1187, 1192 n.30, 1194 n.42.

[5] The conversion doctrine which was also a Board-created doctrine has likewise been abolished by the N.L.R.B. See *Deklewa*, 124 L.R.R.M. at 1192.

[6] The N.L.R.B. has also abolished the job-site-by-job-site versus permanent and stable distinctions. See, *Deklewa*, 124 L.R.R.M. at 1191, 1194.

As a result of the Ninth Circuit's decision, the courts will for years to come be required to litigate and determine all of these issues based on Board-created doctrines, all of which have been abolished by the Board. In *Deklewa*, the Board noted that if it were to apply the nonrepudiation doctrine prospectively only, "we would then be required for an indefinite period of time to perpetuate the administrative and litigational difficulties entailed in application of arcane current law to all pending 8(f) cases." *Deklewa*, *supra*, 1124 L.R.R.M. at 1198. As a result of the Ninth Circuit's decision, the Courts will indefinitely face that identical problem in § 301 actions. Such a result places a cloud over all pre-hire agreements entered into prior to *Deklewa*, and severely undermines the objective of labor stability which the N.L.R.B. sought to achieve in the *Deklewa* decision.

Moreover, since the N.L.R.B. has determined that it will apply *Deklewa* retroactively and the Ninth Circuit has decided it will not, the result obtained in any particular case will now depend entirely on the forum chosen, and the goal of uniformity in the enforcement of our labor laws will be seriously undermined.

In view of the decision below a substantial risk of inconsistent decisions between the Courts and the Board has arisen. Two divergent lines of cases necessarily will emerge—one from the N.L.R.B. and one from the Courts —with diametrically opposed results. For instance, in *Laborers' Health and Welfare Trust Fund for Northern California* v. *Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988), this Court held that federal courts do not have jurisdiction to entertain an action by an employee benefit trust fund to collect delinquent contributions post-contract termination. Rather, this Court held that such issues must be determined by the N.L.R.B.

Therefore, any time an employee benefit trust fund files an action to collect delinquent contributions and the employer raises repudiation as a defense, the trust

fund will file an unfair labor practice charge before the N.L.R.B. In that situation, two separate actions will be pending simultaneously before the N.L.R.B. and the Court. The Board, applying *Deklewa* retroactively, will find the employer bound to the agreement. The Court, refusing to apply *Deklewa* retroactively, on the same set of facts, will find the same employer not bound to the agreement. Under these circumstances, which decision will prevail? The Ninth Circuit's decision did not even address this issue, let alone answer this question.

Petitioner submits that under the primary jurisdiction doctrine, the Board's decision would prevail since determination of the "appropriate bargaining unit" is crucial to resolving a repudiation claim. See, *e.g.*, *Carpenters Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1278 (9th Cir., 1984), discussing the "primacy" of the Board's authority under Section 9 of the N.L.R.A (29 U.S.C. § 159) over representation questions.

If the Board's decision would prevail, then the entire litigation of the repudiation issue before the District Court becomes an exercise in futility, not justifying the imposition on the Court's scarce judicial resources.

Additionally, inconsistent decisions between the Board and the Courts will result in inconsistent rights and obligations. The parties will never fully be sure of their rights and obligations under the agreement. The employees, likewise, will not know for sure whether they are or are not entitled to union wages and fringe benefits, or whether they are or are not protected by the grievance procedure. This confusion will disserve the national interest of labor stability and uniform application of the nation's labor laws, resulting in chaotic labor relations in the construction industry. Only by uniformly applying one set of laws and rules can this situation be avoided. Since the N.L.R.B. is the expert agency created by Congress to interpret the stat-

ute, and since all courts which have considered the question agree that the Board's interpretation in *Deklewa* better serves the statutory objectives, the Board's interpretation concerning retroactive application of *Deklewa* should prevail.

II. THE FACTORS SET OUT IN *CHEVRON OIL CO. v. HUSON*, 404 U.S. 97 (1971) FAVOR RETROACTIVE APPLICATION OF *DEKLEWA*.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), this Court set out the three factors which must be considered in determining that a new rule of law will be applied prospectively only and will not be given retroactive effect. In order for the decision to be applied prospectively only the decision 1) must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; 2) the court must weigh the merits of the case and determine whether retroactive application will further or retard the application of the rule; and 3) the court must determine whether retroactive application will produce substantial inequitable results. (*Id.* at 106-107). As demonstrated *supra*, failure to apply *Deklewa* retroactively retards rather than furthers the objectives of the rule. As applied here, each of the remaining factors likewise favors retroactive application of *Deklewa*.

A. The Rule Announced in Deklewa Did Not Overrule Clear Past Precedent or Decide an Issue of First Impression Whose Resolution Was Not Clearly Foreshadowed.

The Ninth Circuit acknowledged in this case that its decision not to apply *Deklewa* retroactively would result in a conflict in the circuits; however, it determined that it would not follow the lead of the Eighth Circuit, the Third Circuit and the Board because it believed that *Deklewa* had overruled clear past precedent on which Mesa Verde had relied in repudiating the agreement.

While the Court acknowledged that "neither the Supreme Court nor this Court had specifically addressed the proper method of repudiation" at the time Mesa Verde purported to repudiate the agreements (*Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers*, 885 F.2d 594, 596-97 (9th Cir. 1989), it nevertheless held that Mesa Verde had relied on its "undoubted right" to repudiate. This, however, does not resolve the issue of whether Mesa Verde's reliance upon that "right" was justified. Although the right to repudiate may have been "undoubted" prior to *Deklewa*, that right was never "absolute." Therefore, the *method* of repudiation is critical. The question was not, as the Ninth Circuit phrased it, whether Mesa Verde properly relied upon a "right to repudiate" but, rather, whether Mesa Verde properly relied upon the *method* it chose to attempt the repudiation.

Section 8(f) was added to the Act in the 1959 amendments in an attempt to accommodate the needs of both labor and management in the construction industry. The purpose in enacting § 8(f) was to legitimize pre-hire agreements which were prevalent in the construction industry, and which were required as a result of the unique characteristics of that industry. The primary characteristic of the construction industry is, of course, the sporadic employment patterns. As the Board in *Deklewa* noted, the legislative history of § 8(f) demonstrates that Congress intended by the enactment of § 8(f) to legitimize and make enforceable the array of construction industry bargaining, referral, hiring and employment practices which were prevalent in the industry. (*Deklewa*, *supra*, 124 L.R.R.M. 1191). The legislative history of § 8(f) contains no hint that Congress intended to create a right to repudiate the very type of agreement which Congress was specifically legitimizing. (*Id.*)[7]

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[7] The Board's reading of the legislative history of § 8(f) was accepted by the Third Circuit in *International Association of Iron Workers v. N.L.R.B.*, *supra*, the Eighth Circuit in *N.L.R.B. v. W.L. Miller Co.*, *supra*, and the Ninth Circuit *en banc* in the instant case.

In *N.L.R.B. v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers* (*Higdon*), 434 U.S. 335 (1978), this Court upheld the Board's interpretation of the repudiation doctrine. The Court's opinion in *Higdon* was based on deference to the Board's expertise in construing the Act. Thus, Justice White emphasized that "[w]e have concluded that the Board's construction of the Act, although perhaps not the sole feasible one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory section." (*Higdon*, *supra*, 434 U.S. at 341). *Higdon* dealt with the sole question of whether a union violated § 8(b)(7)(C) of the Act (29 U.S.C. § 158(b)(7)(C) when it picketed to enforce a pre-hire agreement.[8] *Higdon* dealt only with statutory rights and obligations enforced via the N.L.R.A., not with contractual rights and obligations enforced via § 301 of the L.M.R.A.

In *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983), this Court made that point clear by noting that there is "a critical distinction between an employer's obligations under the Act to bargain with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrue after it enters into a pre-hire contract. Only the former obligation was treated in *Higdon*." (*Id.* at 267)

Section 8(f) on its face speaks of only *one* method of terminating the collective bargaining relationship—that is by a Board-conducted election in which a majority of the employees vote to decertify the union. Prior to *Deklewa* being decided, that was the only guaranteed method by which the relationship could be terminated. In *McNeff*, this Court unequivocally held that pre-hire agree-

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[8] Section 8(b)(7)(C) prohibits "recognitional" picketing beyond a "reasonable time" without filing a petition for an election with the NLRB under § 159(c) of the NLRA.

ments authorized by § 8(f) are binding agreements fully enforceable under § 301 of the L.M.R.A., 29 U.S.C. § 185. Moreover, in *McNeff*, this Court *specifically declined* to determine what *method* would be required to effectively repudiate a pre-hire agreement, but noted that it may well be necessary to "precipitat[e] a representational election pursuant to the final proviso in § 8(f) that shows the union does not enjoy majority support" (*Id.*, at 207 n. 11). That is exactly what the Board determined is necessary in *Deklewa*.

Thus, the proper *method* by which a § 8(f) agreement could be repudiated was strongly in doubt. Indeed, whether or not a Court could even consider the issue of repudiation in a § 301 action was in doubt.

In *Contractors, Laborers, Teamster & Engineers Health and Welfare Plan v. Associated Wrecking Company*, 638 F. 2d 1128 (8th Cir., 1981), the Eighth Circuit stated:

> "Local 103 (*Higdon*) held that an employer does not commit an *unfair labor practice* for breach of its duty to bargain by unilaterally abrogating a pre-hire agreement with a labor union that never obtains majority support. It does not necessarily follow, however, that the absence of majority status leaves the union without a remedy for *breach of contract* on any provision of the § 8(f) agreement. To say that an employer may challenge the majority status of a union in an unfair labor practice proceeding is not to say that the employer may assert the union's lack of majority status as a defense in a breach of contract action on a type of contract specifically authorized by the Act." (*Id.*, at 1133) (emphasis the Court's).[9]

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[9] *Accord, New Mexico District Council of Carpenters v. Mayhew Co.*, 664 F.2d 215, 219-220 (10th Cir., 1981); see also *Mo-Can Teamsters Pension Fund v. Creason*, 716 F.2d 772, 775 (10th Cir., 1983) ("If the employer believed that the union did not represent a majority of his employees, his proper recourse was before the N.L.R.B. Lack of majority status can only be challenged in an

In fact, at the time *Deklewa* was decided, the Ninth Circuit itself did not have a clear line of cases upon which an employer could have relied as to the proper *method* of repudiating a pre-hire agreement. See, *e.g.*, *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co.*, 746 F.2d 557 (9th Cir. 1984) (N.L.R.B. has exclusive jurisdiction over repudiation issues except where the unit *at all times was a single employee unit over which the Board would not assert jurisdiction*); [10] *Mesa Verde v. Northern Cal. Dist. Council of Laborers*, 598 F. Supp. 1095 (N.D. Cal., 1984) (Letters sufficient to constitute repudiation); *John S. Griffith Construction Co. v. United Brotherhood of Carpenters*, 785 F.2d 706 (9th Cir. 1986) (Exhaustion requirement whereby employer must file Petition with the N.L.R.B. and the N.L.R.B. must decline to assert jurisdiction prior to proceeding to Court); and *United Brotherhood of Carpenters v. Endicott Enterprises, Inc.*, 808 F.2d 918 (9th Cir. 1986) (Open and notorious breach of the agreement as to which union and employees have actual notice sufficient to repudiate.)

In addition to the lack of any clear line of cases which would establish the proper method for repudiating, the "right" to repudiate prior to *Deklewa* was never absolute. Under pre-*Deklewa* law, once a union attained majority status, that is, represented the majority of the employees in an appropriate bargaining unit, the pre-hire agreement "converted" into a standard § 9(a) (29 U.S.C. § 159(a)) collective bargaining agreement which was no longer capable of repudiation. *McNeff*, *supra*, 461 U.S. 260, 271

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unfair labor practice proceeding, over which the N.L.R.B. has exclusive jurisdiction.").

[10] Indeed, at the time Mesa Verde "repudiated" the agreements, *Beck Engineering* was the law of the Circuit. Since it was undisputed that Mesa Verde never employed only a "single employee unit," Mesa Verde could not have reasonably relied upon *Beck* to justify its repudiations.

(1983). In adopting *Deklewa* as the law of the Circuit, the Ninth Circuit Court *en banc* noted that under the conversion doctrine, a pre-hire agreement could be converted to a standard collective bargaining agreement at any time from several days to some years after the pre-hire agreement was negotiated. *Mesa Verde, supra*, 861 F.2d at 1133. Conversion could even occur immediately upon adoption of the pre-hire agreement. (*Id.*) Moreover, conversion could occur without a majority of the unit's employees ever voting to accept a bargaining representative (*Id.* at 1134) and without the parties even being aware that a conversion had taken place. Thus, this "undoubted right" to repudiate could cease to exist at any point during the collective bargaining relationship. As a result of the conversion doctrine, the only sure method of effecting a repudiation was by way of a Board-conducted election.

The Board, in determining to apply *Deklewa* retroactively, specifically addressed whether employers had a legitimate reliance interest in attempting to repudiate pre-hire agreements by methods other than precipitating a Board-conducted election, and determined that they did not. The Board acknowledged that during the pre-*Deklewa* period the law was "unsettled and confusing." *Deklewa*, 124 L.R.R.M. at 1198). In discussing the past cases upon which employers may have relied, the Board noted:

> The interest which is entitled to protection is the *ability of an employer to avail itself of the Board processes* to determine whether there is continued majority support to undergird the union and the agreement. The new rule, *which affirms the Board's election procedures for resolving that issue,* does not seriously detract from what an employer should appropriately expect in the way of protection under the old rule. (*Id.* at 1198 n.61) (emphasis added).

Finally, not only was the proper method of repudiation unclear prior to *Deklewa* but, more important, the rule in *Deklewa* was clearly foreshadowed. This Court in *McNeff* suggested that there may be "*considerations properly cognizable by a Court under § 301* which might prevent a party in particular circumstances from exercising its option under § 8(f) to repudiate a pre-hire agreement before the union demonstrates majority status." *McNeff*, 461 U.S. at 271 n.13) (emphasis added).[11] That statement clearly put all parties on notice that they could not justifiably rely upon any perceived "absolute right" to repudiate pre-hire agreements in mid-term by any *method* other than that specifically provided for in the statute, namely, a Board-conducted election. *See N.L.R.B. v. Miller Co.*, 871 F.2d 745 (8th Cir. 1989) (upholding the Board's retroactive application of *Deklewa* and pointing out that the prior rule permitting repudiation had "twice been rejected by the District of Columbia Circuit" and had been "sharply questioned by the Third Circuit"); *International Association of Bridge, Structural and Ornamental Iron Workers, Local 3 v. N.L.R.B.*, 843 F.2d 770, 780 n.12 (3d Cir., 1988), *cert. den.*, 57 U.S.L.W. 3529 (1989) (affirming retroactive application of *Deklewa* and noting that retroactive application would be appropriate under the tests in either *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947) or *Chevron v. Huson*, 404 U.S. 97 (1971)); See also, *R.W. Granger v. Eastern Massachusetts Carpenters*, 686 F. Supp. 22 (D. Mass., 1988) (applying *Deklewa* retroactively on the ground that

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[11] Petitioners submit that this statement is a reference to the primary jurisdiction doctrine which vests primary jurisdiction in the N.L.R.B. over bargaining unit and representation matters. See, *South Prairie Construction Co. v. Local 627, I.U.O.E.*, 425 U.S. 800 (1976); *Carpenters Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1278 (9th Cir., 1984). Bargaining unit determinations and representation issues are at the heart of determining whether or not a union has obtained majority status within an appropriate bargaining unit.

no manifest injustice would occur because the employer's reliance was not without risk and "at the time Granger repudiated the 1986-1989 collective bargaining agreement there was a substantial risk that the union may have obtained majority status.")

In view of the fact that the "proper method" for repudiation was unsettled, any employer who sought to repudiate a § 8(f) agreement by any method other than precipitating a Board-conducted election did so at their own risk.[12] Since the employer voluntarily assumed the risk of attempting to repudiate by any method other than a Board-conducted election, that voluntary assumption of the risk cannot meet the standard of having relied on "clear past precedent" under *Chevron v. Huson* and should not justify creating a conflict in the circuits on this important issue.

B. The Equities Favor Retroactive Application of Deklewa.

In adopting *Deklewa*, the Board sought to "serve better the fundamental statutory policies of employee free choice and labor relations stability." *Deklewa*, 124 L.R.R.M. at 1198. As demonstrated, *supra*, failure to apply *Deklewa* retroactively disserves the policy of labor relations stability. In addition, employee free choice suffers if *Deklewa* is not applied retroactively because courts, unlike the NLRB, lack an election mechanism whereby employees may express their representational preference. The Ninth

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[12] It is not hard to understand why the employer here did not file for such an election since, as the *en banc* court found, at the time of the purported repudiation "Mesa Verde was working on a project . . . at which it employed members of both unions." (*Mesa Verde*, 861 F.2d at 1126) Indeed, it was undisputed that a majority of Mesa Verde's employees had at all times been members of the union. Thus, Mesa Verde stood virtually no chance of winning an election before the Board and chose, instead, to take the risk of attempting to repudiate the agreement by way of a letter rather than by way of an election.

Circuit discounted this argument, stating that since the case involves "strictly historical disputes," a representation election can no longer be effectively held. *Mesa Verde, supra*, 885 F.2d at 597). That, however, is an assumption without a basis in fact or law.

In *Deklewa*, the employer attempted to repudiate the agreement in 1983. In 1987, the Board found no obstacle to applying the rule retroactively despite the four intervening years. The Board specifically addressed the issue of elections in the construction industry and noted that "since 1959 the Board has gained substantial expertise and developed detailed procedures for conducting elections in the construction industry. . . . The Board is not inexperienced in developing election rules and procedures to accommodate short-term and sporadic employment patterns." (*Deklewa, supra*, 124 L.R.R.M. at 1195 n.45). The Board noted that henceforward, after *Deklewa*, employer R.M. petitions will no longer have to be supported by traditional "objective considerations" and that the mere existence of a § 8(f) agreement will be sufficient to obtain an election. (*Id.* at 1194, 1195 n.42).

Thus, the Board has anticipated in *Deklewa* that it will be required to exercise the expertise with which it was vested by Congress to develop rules and systems designed to deal with the myriad of election situations which will develop under the non-repudiation rule. The Ninth Circuit decision anticipates that the Board will fail in this task which the Board acknowledged it would have to undertake. Significantly, however, the Court's decision does not cite any facts to support this anticipated failure on the part of the Board. Mere speculation as to Board's ability or inability to deal with election issues should not be the basis for depriving employees of a voice in the decision as to whether their collective bargaining agreement remains in existence.

Moreover, it simply strains credibility to argue that enforcement of the unambiguous terms of a collective

bargaining agreement is inequitable. See, *International Association of Iron Workers v. N.L.R.B.*, 843 F.2d at 781. When the unions entered into the collective bargaining agreements, they assumed that Mesa Verde would terminate those agreements only at the time and in the manner provided for in the agreements.[13] If the employer wanted the assurance that it could terminate the agreements at any time, it was incumbent upon it to negotiate such assurance into the language of the agreements. Retroactive application of *Deklewa* requires that the courts do nothing more than enforce the terms of the agreements to which the parties have voluntarily agreed. (*International Association of Iron Workers v. N.L.R.B.*, 843 F.2d at 781).

The fact that the employer may have to make monetary restitution for its breach of the collective bargaining agreements is not a reason to deny retroactive application. Here the employer undertook its contractual violation knowing full well the legal uncertainties of its position. The employer could have filed for an election with the N.L.R.B. to avoid those uncertainties. However, it chose not to do so. Being required to pay damages for its contractual violation is no different than the remedy awarded for a breach of any other type of contract. This

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[13] Significantly, it should also be noted that the unions in this case argued that since the agreements contained mechanisms for terminating the collective bargaining relationships, the issue of whether the repudiation was effective was for an arbitrator to determine under the broad arbitration clauses. The District Court and the Ninth Circuit disagreed, based on the fact that Mesa Verde was exercising a "statutory" right as opposed to a "contractual" right. This holding, however, is directly contrary to this Court's holding that *statutory* rights and obligations are arbitrable just as contractual rights and obligations are arbitrable. See, *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) and *Shearson-American Express, Inc. v. McMahon*, 482 U.S. ——, 96 L. Ed. 2d 185 (1987).

Court has already addressed this issue in *McNeff*, *supra*, where, despite a claimed repudiation of the pre-hire agreement, an employer was required to make monetary restitution:

> However limited the binding effect of a pre-hire agreement may be, it strains both logic and equity to argue that a party to such an agreement can reap its benefits and then avoid paying the bargained for consideration. Nothing in the legislative history of § 8(f) indicates that Congress intended employers to obtain free the benefits of stable labor costs, labor peace, and the use of the union hiring hall. Having had the music, he must pay the piper. *McNeff*, *supra*, 461 U.S. at 271.

In short, the "right" to repudiate pre-hire agreements was a windfall for employers. Now that it has been determined by the Board, the Third Circuit, the Eighth Circuit, and the Ninth Circuit *en banc* that repudiation does not serve the policies of labor stability and employee free choice, it is not unjust to deprive employers of the benefits of their prior windfall. Rather, an inequity results if the courts shift the burden of the employers' breach of the agreements to the employees who have lost, among other things, their pension and health and welfare benefits, and whose rights to free choice in the selection of their bargaining representative were sacrificed in the first place. Where the burden of the breach must be borne by either the employer or the employees, equity requires that the employer, who was acting in its own "self-interest," assume the liability for its own breach of the agreements.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should issue to resolve this significant conflict in the circuits.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-1655

D.C. No. CV-84-4389 WWS

MESA VERDE CONSTRUCTION CO.,
Plaintiff-Appellee,

v.

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS,
Defendant-Appellant.

No. 85-2074

D.C. No. C-84-5519 WWS

MESA VERDE CONSTRUCTION COMPANY,
Plaintiff-Appellee,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES
CONFERENCE BOARD,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Argued En Banc and Submitted March 16, 1988
Remanded by Opinion of November 15, 1988

Filed September 13, 1989
Amended January 26, 1990

ORDER AND AMENDED OPINION

Before: Dorothy W. Nelson, Charles Wiggins and John T. Noonan, Jr., Circuit Judges

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Opinion by Judge Wiggins; Dissent by Judge Noonan

Victor J. Van Bourg, Van Bourg, Weinberg, Roger & Rosenfeld, San Francisco, California, for the defendant/appellant.

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Patrick J. Syzmanski, Washington, D.C., for the amicus National Labor Relations Board.

Lawrence Gold, Washington, D.C., for the amicus District Council of Carpenters of Seattle, King County & Vicinity, and Local 3 International Union of Operating Engineers.

G. Brockwell Heylin, Washington, D.C., for the amicus Associated General Contractors of America, Inc.

Douglas N. Friefield, San Francisco, California, for the amicus W.B. Skinner, Inc.

Judd H. Lees, Williams, Kastner & Gibbs, Bellevue, Washington, for the amicus Ken Hash Construction.

ORDER

The Opinion filed on September 13, 1989 is amended as follows:

The phrase "to employers who repudiated pre-hire agreements prior to that decision" is added after the word "rule" in the last sentence of the opinion.

With the above amendment, the Petition for Rehearing is denied and the Suggestion for Rehearing En Banc is rejected.

OPINION

WIGGINS, Circuit Judge:

The Northern California District Council of Laborers and the Carpenters 46 Northern California Counties Conference Board (collectively Laborers) appeal from the district court's declaratory judgment that Mesa Verde Construction Company (Mesa Verde) effectively repudiated pre-hire collective bargaining agreements between the parties. This panel affirmed, but the Laborers suggestion for rehearing en banc was subsequently granted. The en banc panel adopted as the law of this circuit the decision of the National Labor Relation Board (NLRB or Board) in *Deklewa v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local 3*, 282 N.L.R.B. No. 184, 1986-87 (NLRB Dec. (CCH) ¶ 18,549 (Feb. 20, 1987), *enforced*, 843 F.2d 770 (3d Cir. 1988), that pre-hire collective bargaining agreements may not be unilaterally repudiated prior to a Board-certified election or termination of the contracts. The en banc panel remanded the case to this panel to determine whether to apply *Deklewa* retroactively. We hold that *Deklewa* should not be applied retroactively and affirm the judgment below.

BACKGROUND

In our original opinion we summarized the facts as follows:

> Mesa Verde is a general contractor, specializing primarily in constructing shopping centers in Arizona, California, and Colorado. Mesa Verde typically subcontracts out most of its work except for some carpentry and odd jobs. In 1979 it reached its first

agreement with the Laborers, and on June 26, 1980 it signed the contract with the Laborers that is here in dispute. The contract was to remain in effect until June 15, 1983 and would continue thereafter from year to year absent written notice by either party. By the contract's terms Mesa Verde agreed to "comply with all wages, hours, and working conditions set forth in the Laborer's Master Agreement for Northern California." That agreement is a sixty-seven-page contract between the Laborers, the Associated General Contractors of California, Inc. and the Bay Counties General Contractors Association. It sets wage rates for numerous jobs and provides for arbitration, with certain exceptions, of "any dispute concerning the interpretation or application of the agreement." On November 17, 1982 Mesa Verde and the Laborers agreed in writing that their 1980 contract would continue in effect until June 15, 1986.

Mesa Verde first entered into a collective bargaining agreement with the Carpenters in August 1979. Through a memorandum agreement Mesa Verde and the Carpenters accepted the Carpenters Master Agreement for Northern California, a forty-nine-page contract between the Carpenters, the Building Industry Association of Northern California, the California Contractors Council, Inc. and the Millwright Employers Association. That agreement sets rates for numerous jobs and provides for arbitration of "[a]ny dispute concerning the relationship of the parties, any application or interpretation of this Agreement." Through a subsequent memorandum agreement executed in June 1980 the parties accepted the new June 16, 1980 to June 15, 1983 Carpenters Master Agreement. On September 8, 1982 Mesa Verde and the Carpenters early extended the master agreement to June 15, 1986, with certain modifications limiting wage increases and providng more flexible working conditions for Mesa Verde.

> Mesa Verde informed the unions of its intent to abrogate its agreements with them in May of 1984. At the time Mesa Verde was working on a project in Hercules, California, at which it employed members of both unions. Mesa Verde notified the Carpenters of its repudiation through a May 8, 1984 letter and notified the Laborers through a May 15, 1984 letter. In late May or early June of 1984, after its notice to the unions, Mesa Verde started another project in Orland, California without union workers, in contravention of the collective bargaining agreements, if they were still in effect. Both unions gave Mesa Verde notice of grievance and requested arbitration regarding Mesa Verde's contractual obligations for the Orland project. Mesa Verde then brought suit against both unions seeking a declaration that it need not comply with the agreements with regard to projects begun after its repudiations in May 1984.

Mesa Verde Constr. Co. v. Northern. Cal. Dist. Council of Laborers, 820 F.2d 1006, 1007-08 (9th Cir. 1987), *withdrawn*, 832 F.2d 1164 (9th Cir. 1987).

The district court granted Mesa Verde summary judgment against both unions, holding that the collective bargaining agreements at issue were construction industry "pre-hire" agreements and that under section 8(f) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(f) (1982), Mesa Verde's May 1984 letters were sufficient to repudiate their agreements with respect to future projects. 598 F. Supp. 1092, 1101 (N.D. Cal. 1984). This panel affirmed, finding that circuit precedent permitted an employer to repudiate unilaterally a pre-hire collective bargaining agreement. 820 F.2d at 1012. Upon rehearing, the en banc panel adopted *Deklewa* as the law of this circuit, holding that a "pre-hire agreement[] may not be unilaterally repudiated by either a union or an employer prior to its termination or absent an election among the appropriate bargaining unit's

employees to reject the union." 861 F.2d 1124, 1137 (9th Cir. 1988) (en banc). The en banc panel, however, remanded the case to this panel to determine whether *Deklewa* should be applied retroactively. *Id.*

DISCUSSION

The en banc panel directed that our retroactivity analysis be governed by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). In *Chevron* the Supreme Court articulated three factors applicable to the analysis: (1) whether the decision to be applied retroactively established a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression; (2) the effect of retroactivity on accomplishing the purpose of the law, and (3) the inequity imposed by retroactive application. *Id.* at 106-07.

The en banc panel noted that "*Deklewa* overrules clear precedent that the employer in *Mesa Verde* obviously relied on in repudiating the pre-hire agreements." 861 F.2d at 1137. The Laborers take issue with this statement, arguing that at the time Mesa Verde's repudiation occurred, Ninth Circuit law did not permit an employer unilaterally to repudiate an agreement absent a NLRB election. The case cited by the Laborers, *Operating Eng'rs Pension Trust v. Beck Eng'g & Surveying*, 746 F.2d 557 (9th Cir. 1984), however, does not stand for that proposition. Acknowledging that the Supreme Court had left open the question of what specific acts would effect repudiation of a pre-hire agreement, *Operating Engineers* expressly declined to decide the issue. *Id.* at 564-65 (citing *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 270-71 n.11 (1983)). We agree with the en banc panel that Mesa Verde relied on clear precedent in repudiating the agreement. Although neither the Supreme Court nor this court had specifically addressed the proper method for repudiation, both courts had clearly held that "an employer is able to exercise the right of repudiation

until the union achieves a majority status." *Todd v. Jim McNeff, Inc.*, 667 F.2d 800, 803 (9th Cir. 1982), *aff'd*, 461 U.S. 260 (1983).

The Laborers contend that retroactive application would further statutory objectives of labor relations stability and employee free choice. Noting that the NLRB applies *Deklewa* retroactively to cases pending at the administrative level, they argue that the federal courts should also apply the rule retroactively to ensure uniformity of decision. The Board's decision to apply *Deklewa* retroactively is not binding on this court. *See NLRB v. Best Products Co.*, 765 F.2d 903, 913 (9th Cir. 1985).[1] At least two district courts have declined to apply *Deklewa* retroactively. *See Trustees of the Nat'l Automatic Sprinkler Indus. Pension Fund v. American Automatic Fire Protection*, 680 F. Supp. 731, 735 (D. Md. 1988); *Construction Indus. Welfare Fund v. Jones*, 672 F. Supp. 291, 294 (N.D. Ill. 1987). The Laborers contend that employee free choice will suffer if the rule is not applied retroactively because courts lack the ability to conduct an election allowing employees to express their preference. This argument, however, ignores the fact that in cases such as the present one, "involving strictly historical disputes, a representation election can no longer be effectively held." *Nat'l Automatic Sprinkler Indus.*, 680 F. Supp. at 735.

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[1] In *Best Products* we stated that "while the court is not bound by the Board's view on retroactive application, it should defer to those views absent manifest injustice." 765 F.2d at 913. The Eighth Circuit adopted this standard in deciding whether to apply *Deklewa* retroactively. *NLRB v. W. L. Miller Co.*, 871 F.2d 745, 748 (8th Cir. 1989) (deferring to the Board's decision to apply *Deklewa* retroactively). Although the en banc panel directed us to review retroactive application independently under *Chevron*, we would reach the same conclusion were we to apply the deferential standard. We conclude that it would be manifestly unjust to apply *Deklewa* retroactively in this case because it would effectively punish the employer for conduct that was lawful at the time it occurred.

If *Deklewa* is applied retroactively, Mesa Verde "would be subjected to a penalty for having taken action which was entirely lawful under pre-*Deklewa* law without being afforded the opportunity to have their assertion of the union's lack of majority status tested either by election or by litigation." *Id.* Since retroactive application in this context would not significantly advance statutory objectives, imposing such an injustice on the employer is clearly unwarranted.

CONCLUSION

Applying the *Chevron* factors, we find that: (1) the existing law clearly allowed either party to repudiate the pre-hire agreement prior to the union's attainment of majority status; (2) retroactive application would punish the employer for doing something that was lawful when done; and (3) advancement of statutory objectives is only questionably served by retroactive application when the relationship between the parties has been terminated. We therefore hold that retroactive application of the *Deklewa* rule to employers who repudiated pre-hire agreements prior to that decision is inappropriate and accordingly AFFIRM the judgment below.

NOONAN, Circuit Judge:

I dissent.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 85-1665, 85-2074

MESA VERDE CONSTRUCTION CO.,
Plaintiff-Appellee,

v.

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS,
Defendant-Appellant.

MESA VERDE CONSTRUCTION COMPANY,
Plaintiff-Appellee,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California

Argued En Banc and Submitted March 16, 1988

Decided Nov. 15, 1988

Remanded.

Wallace, Circuit Judge, dissented with opinion.

Hug, Circuit Judge, dissented with opinion in which Brunetti and Kozinski, Circuit Judges joined.

Kozinski, Circuit Judge dissented with opinion in which Brunetti, Circuit Judge joined.

Victor J. Van Bourg, Weinberg, Roger & Rosenfeld, San Francisco, Cal., for defendants-appellants.

Mark R. Thierman, Thierman, Cook, Brown & Mason, San Francisco, Cal., for plaintiff-appellee.

Patrick J. Syzmanski, Washington, D.C., for amicus N.L.R.B.

Lawrence Gold, Washington, D.C., for amicus Dist. Council of Carpenters of Seattle, King County & Vicinity, and Local 3 Intern. Union of Operating Engineers.

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Douglas N. Friefield, San Francisco, Cal., for amicus W.B. Skinner, Inc.

Judd H. Lees, Williams, Kastner & Gibbs, Bellevue, Wash., for amicus Ken Hash Const.

Before GOODWIN, Chief Judge, WALLACE, ANDERSON,* HUG, TANG, SCHROEDER, FLETCHER, POOLE, WIGGINS, BRUNETTI, and KOZINSKI, Circuit Judges.

WIGGINS, Circuit Judge:

The Northern California District Council of Laborers and the Carpenters 46 Northern California Counties Conference Board (together Laborers) appeal from the district court's declaratory judgment that Mesa Verde Construction Company (Mesa Verde) effectively repudiated pre-hire collective bargaining agreements between the parties. *Mesa Verde Constr. Co. v. Northern Cal. Dist.*

* Judge Anderson participated in the argument of this case, but died before the decision was rendered.

Council of Laborers, 598 F.Supp. 1092 (N.D.Cal.1984). A panel of this court affirmed, 820 F.2d 1006 (9th Cir. 1987), but the Laborers' suggestion for rehearing en banc was subsequently granted. 832 F.2d 1164 (9th Cir. 1987). We hold that the decision of the National Labor Relations Board (NLRB) in *Dekleva v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local 3*, 282 N.L.R.B. No. 184, 1986-87 NLRB Dec. (CCH) ¶ 18,549 (Feb. 20, 1987), *enforced* 843 F.2d 770 (3rd Cir.1988), determining that pre-hire collective bargaining agreements may not be unilaterally repudiated prior to a Board-certified election or termination of the contracts, applies in this circuit. We remand to the panel to determine whether to apply *Dekleva* retroactively under the principles of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971).

FACTS

The panel summarized the facts of the case:

> Mesa Verde is a general contractor, specializing primarily in constructing shopping centers in Arizona, California, and Colorado. Mesa Verde typically subcontracts out most of its work except for some carpentry and odd jobs. In 1979 it reached its first agreement with the Laborers, and on June 26, 1980 it signed the contract with the Laborers that is here in dispute. The contract was to remain in effect until June 15, 1983 and would continue thereafter from year to year absent written notice by either party. By the contract's terms Mesa Verde agreed to "comply with all wages, hours, and working conditions set forth in the Laborers' Master Agreement sixty-seven-page contract between the Laborers, the Associated General Contractors of California, Inc. and the Bay Counties General Contractors Association. It sets wage rates for numerous jobs and provides for arbitration, with certain exceptions, of

"any dispute concerning the interpretation or application of the agreement." On November 17, 1982 Mesa Verde and the Laborers agreed in writing that their 1980 contract would continue in effect until June 15, 1986.

Mesa Verde first entered into a collective bargaining agreement with the Carpenters in August 1979. Through a memorandum agreement Mesa Verde and the Carpenters accepted the Carpenters Master Agreement for Northern California, a forty-nine-page contract between the Carpenters, the Building Industry Association of Northern California, the California Contractors Council, Inc. and the Millwright Employers Association. That agreement sets rates for numerous jobs and provides for arbitration of "[a]ny dispute concerning the relationship of the parties, any application or interpretation of this Agreement." Through a subsequent memorandum agreement executed in June 1980 the parties accepted the new June 16, 1980 to June 15, 1983 Carpenters Master Agreement. On September 8, 1982 Mesa Verde and the Carpenters early extended the master agreement to June 15, 1986, with certain modifications limiting wage increases and providing more flexible working conditions for Mesa Verde.

Mesa Verde informed the unions of its intent to abrogate its agreements with them in May of 1984. At the time Mesa Verde was working on a project in Hercules, California, at which it employed members of both unions. Mesa Verde notified the Carpenters of its repudiation through a May 8, 1984 letter and notified the Laborers through a May 15, 1984 letter. In late May or early June of 1984, after its notice to the unions, Mesa Verde started another project in Orland, California without union workers, in contravention of the collective bargaining agreements, if they were still in effect. Both unions gave Mesa

Verde notice of grievance and requested arbitration regarding Mesa Verde's contractual obligations for the Orland project.

Mesa Verde, 820 F.2d at 1007-08.

Mesa Verde sought a declaratory judgment that it was not obligated to arbitrate the grievances which arose after it gave notices of termination. The district court stayed arbitration of the grievances pending resolution of the declaratory judgment action. The court then granted Mesa Verde summary judgment against both the Carpenters and the Laborers. *Mesa Verde*, 598 F.Supp. at 1094. The court held that the collective bargaining agreements at issue were construction industry "pre-hire" agreements and that, therefore, under 29 U.S.C. § 158(f) (section 8(f) of the National Labor Relations Act (NLRA)), Mesa Verde's May 1984 letters were sufficient to repudiate their agreements with respect to future projects. *Mesa Verde*, 598 F.Supp. at 1101. The court denied a subsequent motion by the Laborers to vacate the court's judgment and to grant the Laborers additional discovery to demonstrate the existence of a core group of employees. *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 602 F.Supp. 327, 330 (N.D.Cal.1985).

A panel of this court affirmed. It followed circuit precedent and held that unilateral repudiation by an employer of a pre-hire collective bargaining agreement was permitted. *Mesa Verde*, 820 F.2d at 1012; *see also International Bhd. of Elec. Workers, Local 441 v. KBR Elec.*, 812 F.2d 495, 497-98 (9th Cir.1987); *NLRB v. Pacific Erectors, Inc.*, 718 F.2d 1459, 1462-63 (9th Cir. 1983). A majority of this court voted to rehear the Laborers' appeal en banc. 832 F.2d 1164 (9th Cir. 1987). En banc review was limited to: (1) whether *Dek'ewa* should be applied retroactively to this case, and (2) whether the rule of *Royal Dev. Co., Ltd. v. NLRB*, 703 F.2d 363, 369 (9th Cir.1983), that a panel may not

overrule prior panels' interpretations of the NLRA even when intervening NLRB cases decide differently, should be overruled.

Background—Judicial History of Section 8(f)

The NLRA generally requires that a union possess majority support before it may act as the bargaining representative for a group of employees. Sections 8(a)(1), (2) and 8(b)(1)(A), 29 U.S.C. § 158(a)(b), collectively require that a union possess majority support before a collective bargaining agreement can be negotiated. *See ILGWU v. NLRB*, 366 U.S. 731, 737, 81 S.Ct. 1603, 1607, 6 L.Ed.2d 762 1961 [hereinafter *Garment Workers*]. Historically, however, the construction industry had established its own unique collective bargaining practices. One such practice was the use of pre-hire agreements between construction unions and employers that allowed the industry's employers to obtain a guaranteed work force before a particular job was begun. In 1948, the NLRB first asserted jurisdiction over the construction industry. *See, e.g., Carpenters Local 74*, 80 N.L.R.B. 533 (1948); *Ozark Dam Constructors*, 77 N.L.R.B. 1136 (1948); *cf. In re Johns Manville Corp.*, 61 N.L.R.B. 1 (1945) The Board refused to make any exceptions to its general rule that minority contracts were illegal and unenforceable. In a number of cases, the Board rejected the general custom and practice in the construction industry" and held that pre-hire collective bargaining agreements were illegal and unenforceable. *See, e.g., Daniel Hamm Drayage Co.*, 84 N.L.R.B. 458, 460 (1950) ("custom and practice" argument better directed to Congress than to the Board); *Chicago Freight Car.* 83 N.L.R.B. 1163 (1949). In response, Congress, recognizing the longstanding use of pre-hire agreements in the construction industry, added subsection (f) to section 8 of the NLRA. S.Rep. No. 187, 86th Cong., 1st Sess. 27 (1959), U.S. Code Cong. & Admin.News 1959, p. 2318, *reprinted in* I *Legislative History of the Labor-*

Management Reporting and Disclosure Act of 1959, at 397, 423-24 1959) [hereinafter *Leg.Hist.*].[1]

Following the enactment of section 8(f), the Board first held that the majority status of a union executing a pre-hire agreement may not be challenged in an unfair labor practice proceeding. *Bricklayers Local 3*, 162 N.L.R.B. 476, 477-79 (1966), *enforced* 405 F.2d 469 (9th Cir.1968); *Oilfield Maintenance Co.*, 141 N.L.R.B. 1384, 1387 and n. 10 (1963). *See NLRB v. Local Union No. 103, Int'l Ass'n of Bridge Structural & Ornamental Ironworkers*, 434 U.S. 335, 350-51, 98 S.Ct. 651, 660-61, 54 L.Ed.2d 586 (1978) [hereinafter *Higdon*]. Thus, an employer could not unilaterally repudiate a pre-hire agreement with a union. The Board later switched its position regarding the repudiation issue and allowed unilateral repudiation of such pre-hire agreements. *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693 (1971), *enforcement denied sub nom. Local 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186 (D.C.Cir.1973); *Ruttman Constr. Co.*, 191 N.L.R.B 701 (1971) (companion case to *RJ. Smith*). In *Ruttman*, the Board stated:

> [I]n enacting Section 8(f) to assist in resolving such problems, Congress merely permitted parties to enter into such pre-hire agreements without violating the Act. It does not mean that a failure to abide by such an agreement is automatically a refusal to bargain. In essence, therefore, this pre-hire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship . . . .

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[1] The history of the passage of the amendment to section 8 was protracted. In 1951, a bill was first introduced by Senators Taft and Humphrey to allow pre-hire agreements, but it failed to obtain approval in the 82nd Congress. Similar bills, supported by the Eisenhower administration, were introduced in every Congress after that. Finally, in 1958, Senators Kennedy and Ervin proposed an amendment substantially similar to the original bill and it was ultimately signed into law.

Ruttman, 191 N.L.R.B. at 702. The Board in *Ruttman* dismissed *Oilfield Maintenance* as being "primarily concerned" with "the right of a successor-employer to disavow contracts made by a predecessor" employer. *Id.* at 701 n. 5; *see also Higdon*, 434 U.S. at 350-51, 98 S.Ct. at 660-61.

DISCUSSION

As appears from our discussion of the history of section 8(f), the latest expression of opinion by the Board prior to *Deklewa* was that a pre-hire agreement could be terminated by the unilateral repudiation of it by either the employer or the union. We gave effect to that opinion in our circuit. *See, e.g., KBR Elec.*, 812 F.2d at 497-98.

In *Deklewa*, the NLRB announced a new rule. The Board decided that section 8(f) [2] collective bargaining

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[2] Section 8(f), 29 U.S.C. § 158(f) (Agreement Covering Employees in the Building and Construction Industry), provides:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsec. (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [29 USCS § 159] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities of employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length

agreements may not be unilaterally repudiated by employers or unions. "When parties enter into an 8(f) agreement, they will be required . . . to comply with that agreement unless the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative." *Deklewa*, 1986-87 NLRB Dec. (CCH) ¶ 18,549, at 31-708. The Board expressly rejected *R.J. Smith* and *Ruttman*. It decided that pre-hire collective bargaining agreements should confer on a union at least some section 9(a) exclusive bargaining agent status. *Deklewa*, NLRB Dec. (CCH) at 31,709.

The primary issues before the en banc panel are whether this court has the power in view of existing Supreme Court precedent to adopt the rule of *Deklewa* as the law of this circuit, and if that power exists, whether it best serves the interests of employers and employees to do so.

I. *Supreme Court Precedent.*

Deklewa's non-repudiation rule seems to conflict with Supreme Court precedent set out in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 103 S.Ct. 1753, 75 L.Ed.2d 830 (1983); *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed.2d 586 (1978) [hereinafter Higdon]. In *Higdon*, the Court reversed a decision of the D.C. Circuit and upheld the NLRB's determination that an uncertified union with an 8(f) agreement with an employer committed an unfair labor practice under section 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C), by picket-

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of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsec. (a)(3) of this section]: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [29 USCS § 159(c) or (e)].

ing the employer to force it to adhere to the agreement. *Higdon*, 434 U.S. at 341, 98 S.Ct. at 655. In *McNeff*, the Court held that despite the repudiation of an 8(f) agreement by the employer, monetary obligations incurred by the employer to an uncertified union prior to the repudiation survived the repudiation. *McNeff*, 461 U.S. at 271-72, 103 S.Ct. at 1759. The Court stated, however, that 8(f) agreements may be repudiated at will. *Id.* at 270, 103 S.Ct. at 1758. Thus, it would seem that Supreme Court precedent requires that we reject *Deklewa's* new rule. In neither case, however, did the Supreme Court definitely construe 8(f). Rather, the Court found that the Board's interpretation of 8(f) was an acceptable interpretation of the statute and that it reasonably implemented the purposes of the Act. The Court, therefore, deferred to the NLRB's interpretation of 8(f).

Specific language in both opinions supports our conclusion that the Supreme Court in *Higdon* and *McNeff* only deferred to the NLRB's interpretation of 8(f) and we are not precluded from adopting the Board's new interpretation. The Court in *Higdon* recognized that "'[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.'" *Higdon*, 434 U.S. at 350, 98 S.Ct. at 660 (quoting *NLRB v. Truck Drivers Local Union No. 449, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 353 U.S. 87, 96, 77 S.Ct. 643, 648, 1 L.Ed.2d 676 (1957)). The Court found that the Board's then current construction of section 8(f) in *R.J. Smith*, 191 N.L.R.B. 693 (1971), *enforcement denied sub nom. Local 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186 (D.C.Cir.1973), was not fundamentally inconsistent with the Act nor had the Board moved into a new area of regulation that Congress had not committed to it. *Higdon*, 434 U.S. at 350, 98 S.Ct. at

660; *accord NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 499, 80 S.Ct. 419, 432, 4 L.Ed.2d 454 (1960) (Court rejected Board's policy decision because outside congressional mandate). The Court "concluded that the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections." *Higdon*, 434 U.S. 341, 98 S.Ct. at 656. Thus, in *Higdon*, the Court did not independently construe the reach and scope of section 8(f). Rather, the Court recognized the expertise and experience of the Board in effectuating national labor policy as mandated by Congress and limited its review to whether the Board's interpretation of 8(f) was reasonable.

McNeff similarly is not an independent construction of 8(f). The Court relied on *Higdon's* affirmance of the Board's view of the status of an 8(f) collective bargaining agreement. *McNeff*, 461 U.S. at 266-67, 103 S.Ct. at 1756-57. The Court noted that in *Higdon* it "approved the Board's conclusion that a 'pre-hire agreement is voidable.'" *Id.* at 269, 103 S.Ct. at 1758.[3] Also, as the *Higdon* Court recognized, "[a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *Higdon*, 434 U.S. at 351, 98 S.Ct. at 660-61. We hold that neither *Higdon* nor *McNeff*

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[3] Even in *McNeff*, the Court noted that it did not decide that in every case a section 8(f) contract may be unilaterally repudiated. "We need not consider in this case whether considerations properly cognizable by a court under § 301 might prevent either party, in particular circumstances, from exercising its option under § 8(f) to repudiate a prehire agreement before the union demonstrates majority status." *McNeff*, 461 U.S. at 271 n. 13, 103 S.Ct. at 1759 n. 13. The instant case is likewise a section 301, 29 U.S.C. § 185, contract enforcement case.

preclude this court from adopting the view of the NLRB as expressed in *Deklewa*. Neither constitutes an independent construction of the statute.[4] Rather, the Supreme Court looked to the Board's interpretation, found it reasonable and consistent with the NLRA, and deferred to the Board's interpretation. *Accord NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 496, 105 S.Ct. 984, 988, 83 L.Ed.2d 986 (1985) ("In reviewing Board decisions, we consistently yield to the Board's reasonable interpretations and applications of the Act . . . .").[5] We now

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[4] The Third Circuit recently enforced the NLRB's decision in *Deklewa*. 843 F.2d at 781-82. The court's examination of *Higdon* and *McNeff* comports with our own:

> In neither case has the Supreme Court adopted the Board's *R.J. Smith* interpretation of § 8(f) as definitive and binding. Indeed, in *Higdon*, . . . [t]he Supreme Court thus made clear that it was merely reviewing the Board's interpretation of § 8(f) and not substituting its own judgment or prescribing its own interpretation of the statute. . . .
>
> While *McNeff* is not as explicit as *Higdon* in making it clear that the Supreme Court was merely reviewing the Board's interpretation and not establishing one of its own, nowhere in the *McNeff* opinion does the Court hold that the statute requires § 8(f) agreements to be voidable. Furthermore, *McNeff relies* very heavily upon *Higdon* which did make it clear that the Court was doing no more than holding that the Board's reading of the act was reasonable.

Id. at 776.

[5] The Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), recently set out the proper scope of judicial review of an agency's construction of statute:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that it the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue

turn to *Deklewa* to determine whether the Board's new approach is a reasonable and tenable construction of section 8(f).

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the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations

> "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon the matters subjected to agency regulations.

"If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually

II. *Deklewa.*

A. Legislative History of Section 8(f).

Congress enacted 8(f) in response to the "serious problems" created by the assertion of jurisdiction by the Board over the building and construction industry. *Leg. Hist., supra*, at 423. (Report of Senator Kennedy). Congress also recognized that the industry had special needs which the NLRA did not otherwise address. For an employee, "[t]he occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction." *Id.* For the employer, "it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral." *Id.* at 424. Enactment of section 8(f) represented a recognition of the industry's widespread use of pre-hire collective bargaining agreements designed to address these needs. Congress knew that these agreements were not entirely consistent with "rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired." *Id.*; *see also* H.R.Rep. No. 741, 86th Cong., 1st Sess. 19, U.S.

> have an intent regarding the applicability of the . . . program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program . . . but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one.

Id. at 842-45, 104 S.Ct. at 2781-83 (footnotes and citations omitted). *See also, NLRB v. United Food and Commercial Workers Union Local 23*, —— U.S. ——, 108 S.Ct. 413, 421, 426, 98 L.Ed.2d 429 (1987) (Scalia, J. concurring) (discussing *Chevron*).

Code Cong. & Admin.News 1959, pp. 2318, 2424, *reprinted in* Leg.Hist., *supra*, at 759, 777-78 (following Senate Report in discussing special problems of construction industry). In passing section 8(f), Congress intended to ratify the use of such prehire agreements. The *R.J. Smith* approach, allowing unilateral repudiation of these collective bargaining agreements, has not in the Board's view advanced this evident congressional intent.

In refusing to enforce *R.J. Smith*, the D.C. Circuit noted that it could not "conceive of such an exercise in futility on the part of Congress as to validate a contract with a union having minority status, but to permit its abrogation because of the union's minority status." *Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186, 1190 (D.C.Cir.1973); *see also NLRB v. Irvin*, 475 F.2d 1265, 1271 (3d Cir.1973) ("[n]othing in either the text or the legislative history of § 8(f) suggests that it was intended to leave construction industry employers free to repudiate contracts at will"); *but see Higdon*, 434 U.S. at 349, 98 S.Ct. at 659. We agree with the D.C. Circuit. When a construction employer "hires a union" it should be held to its bargain and not be allowed to back out of the deal at the employer's convenience. We find that the legislative history of 8(f) better supports *Deklewa's* non-repudiation rule rather than the *R.J. Smith* approach.

B. Labor Stability and Employee Free Choice.

Now that we have examined 8(f)'s legislative history, we turn to the two major interests at issue controlling whether prehire agreements should be voidable at will. First, sections 7 and 9 of the NLRA, 29 U.S.C. §§ 157 & 159, grant employees complete "freedom of choice and majority rule in employee selection of representatives." *Garment Workers*, 366 U.S. at 739, 81 S.Ct. at 1608. Second, the structure of the collective bargaining process itself and such provisions as the "contract bar" of the Act guarantee labor relations stability to both employees

and employers. 29 U.S.C. § 159(c)(3) ("Contract bar").[6] The balancing of these interests is certainly within the statutory mandate of the NLRB. *Truck Drivers*, 353 U.S. at 96, 77 S.Ct. at 647. In comparing *R.J. Smith* and *Deklewa*, it would seem that the former, by refusing to confer 9(a) status on a union that had not demonstrated majority support, serves the first interest while *Deklewa* serves the second.[7] *See Higdon*, 434 U.S. 341, 98 S.Ct. at 655 (noting *R.J. Smith*'s focus on employee free choice). However, based on its "expertise and in light of [its] experience in administering Section 8(f)", the Board in *Deklewa* perceived that the *R.J. Smith* voidability rule did not serve, but actually hindered effective expression of employee free choice while seriously damaging maintenance of labor stability in the construction trades. *Deklewa*, NLRB Dec. (CCH) at 31,706-07.

The appellee and amici here argue that by retaining the power to repudiate unilaterally a pre-hire agreement, employers have it in their power to protect their employees' "free choice" rights. We are mindful, as was the Board in *Deklewa*, that an employer's decision to repudiate is more likely based on "the employer's own economic considerations, without reference to or concern for the employees' desire to continue the status quo." *Id.*

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[6] The "contract bar" provides that once a certification election is held within an appropriate bargaining unit, no other election may be held for twelve months.

[7] Section 8(f) confers only limited 9(a) status on unions that have pre-hire agreements with employers. The second proviso to section 8(f) allows for a certification or decertification election at any time during a contract period in contradiction to the normal presumption of majority support enjoyed by a full 9(a) bargaining representative. *Deklewa* also noted:

> [e]ven absent an election, upon the contract's expiration, the signatory union will enjoy no majority presumption and either party may repudiate the 8(f) relationship. The signatory employer will be free at all times from any coercive union efforts, including strikes and picketing, to compel the negotiation and/or adoption of a successor agreement.

Deklewa, NLRB Dec. (CCH) at 31,709.

at 31,706.[8] Also, both the employer and the employees possess explicit statutory means by which to test employee support of a pre-hire bargaining representative.

By its terms, section 8(f) does not confer full 9(a) status on a union. The second proviso to the subsection states that the "contract bar" does not apply to an 8(f) agreement. *R.J. Smith* interpreted the second proviso to mean Congress intended to immunize only the preliminary contractual steps which precede an employer's acquisition of a workforce. *R.J. Smith*, 191 N.L.R.B. at 694. In *R.J. Smith*, the Board determined that the proviso, by limiting the 9(a) status of unions entering into pre-hire agreements, was proof that Congress intended that pre-hire agreements not be mandatory subjects of bargaining and thus voidable at will. *Id.* No necessary connection exists, however, between the right to seek a certification election and the right to refuse to follow a freely negotiated contract. We conclude that *Deklewa's* literal reading of the second proviso is a more likely reading of congressional intent than that given by *R.J. Smith*. An employer is not required to wait one year before seeking a representation election after he has entered into a pre-hire contract. An employer, who after a reasonable time perceives that he is bound by a contract with the union whose minority status seems permanent, may petition under section 9(c) for an election.[9] Likewise, em-

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[8] Congress was also aware that:

> [a] substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired.

Leg.Hist., supra, at 424.

[9] Section 9(c), 29 U.S.C. § 159(c) (Hearings on questions affecting commerce—Rules and regulations), states:

[Continued]

ployees may petition at any time under 9(c) or 9(e) to either fully certify a union under 9(a) or to decertify their putative union.[10] The Board's prior rule, allowing repudiation of such agreements in addition to these explicit statutory protections, has proved unwise We agree with the Board that it should be rejected. Neither the language of the section nor its legislative history support such an extra-statutory self-help remedy.

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[9] [Continued]

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

. . . . .

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsec. (a) of this section];

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

[10] Section 9(e), 29 U.S.C. § 159(e) (Secret ballot—Limitation of elections), states:

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer. (2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

In *Deklewa*, the Board set out its policy covering the results of such elections:

A vote to reject the signatory union will void the 8(f) agreement and will terminate the 8(f) relationship. In that event,

The *R.J. Smith* approach also spawned another species of extra-statutory remedies to *unions*. Under the "conversion" doctrine, an 8(f) relationship and agreement may "convert" to a full 9(a) relationship and agreement. Conversion requires a showing that the signatory union enjoyed majority support, during a relevant period, among an appropriate unit of the employer's employees. Conversion may occur at any time during the working relationship, from several days to some years after the pre-hire agreement was negotiated. Conversion may occur without a majority of a bargaining representative. *See Deklewa*, NLRB Dec. (CCH) at 31,705-07.

Indicia of majority support have included diverse and often complex evidentiary proof. The courts and the Board have looked at such factors as union membership roles, *Pacific Erectors*, 256 N.L.R.B. 421, 424 (1981), *enforced sub nom. NLRB v. Pacific Erectors, Inc.*, 718 F.2d 1459, 1463 (9th Cir.1983), presence of enforced union security clauses, *Irvin*, 475 F.2d at 1270, employer use of referrals from exclusive union hiring halls, *Construction Erectors Inc.*, 265 N.L.R.B. 786, 788 (1982), union administered fringe benefit programs, *Davis Indus.*, 232 N.L.R.B. 946, 952 (1977), and employee statements and actions. *Amado Elec.*, 238 N.L.R.B. 37, 39 (1978). Proof of these complex and difficult evidentiary issues is often lacking. *Deklewa*, NLRB Dec. (CCH) at 31,707.

> the Board will prohibit the parties from reestablishing the 8(f) relationship covering unit employees for a 1-year period. The purpose of this general prohibition is to preclude an employer and a union both from ignoring the electorally expressed preference of a majority of unit employees and from maintaining an 8(f) relationship during a period when the Act precludes holding another election, the availability of which is the sine qua non safeguard to permitting and enforcing an 8(f) contract. Failure to terminate the 8(f) relationship or its premature reestablishment after an election will subject the parties to 8(a)(2) and 8(b)(1)(A) liability.

Deklewa, NLRB Dec. (CCH) at 31,709 (footnotes omitted).

The courts and the Board also have been inconsistent in their application of these factors. *See, e.g., Precision Striping, Inc. v. NLRB*, 642 F.2d 1144, 1148 (9th Cir. 1981) (existence of majority union membership insufficient); *Authorized Air Conditioning Co. v. NLRB*, 606 F.2d 899, 906 (9th Cir.1979) (union membership not necessarily proof of union support), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1598, 63 L.Ed.2d 785 (1980); *contra John Ascuaga's Nugget*, 230 N.L.R.B. 275 n. 1 (1977) (*absence* of union membership does not necessarily indicate lack of majority support).

Determining the appropriate bargaining unit under the conversion doctrine is particularly difficult due to the fragmented nature of the employment relationship in the construction industry. The examination must determine whether there is a single employer or multiple employers and whether the employer uses a permanent and stable workforce or hires on a job-to-job basis. The answers to these questions will determine how and in what fashion conversion takes place. *See Mesa Verde*, 820 F.2d at 1009-11; *KBR Elec.*, 812 F.2d at 497-98.

In addition to the evidentiary problems created by the conversion doctrine, it does little to promote employee free choice or foster labor relations stability. Conversion of an 8(f) agreement into a full 9(a) agreement may take place without the employees ever voting for or against a proposed union. Conversion can take place almost immediately after negotiation of a pre-hire agreement. *Pacific Intercom*, 255 N.L.R.B. 184, 191 (1981); *Wheeler Constr. Co.*, 219 N.L.R.B 541, 542 (1975) (conversion occurred immediately on the parties' adoption of an 8(f) agreement); *cf Carrothers Constr. Co.*, 258 N.L.R.B. 175 n. 1 (1981) (conversion took place ten years before an attempted repudiation). Rather than protect the free choice of employees to choose or reject a union, *R.J. Smith* and its associated conversion doctrine may often prevent them from ever voting for or against a particular union.

The doctrine does not further industry stability. Its complex nature inevitably fosters litigation, as in *Mesa Verde*, to establish whether conversion ever took place, among whom, and at what time. Neither the union, the employer, nor the employees can ever know with real certainty what their rights and obligations are under the contract. *Deklewa* completely eliminates these problems. On the signing of the contract, both parties will be required to comply with the agreement, absent a Board-conducted election to reject or change a bargaining representative. In determining the appropriate unit for election purposes, the Board will no longer distinguish between "permanent and stable" and "project by project" workforces. Single unit employer units will be presumed appropriate. *Deklewa*, NLRB Dec. (CCH) at 31,709.

In summary, we find that the *Deklewa* non-repudiation rule appears consistent with the legislative history of section 8(f), as well as the dominant principles of employee free choice and labor relations stability. Accordingly, we adopt *Deklewa*'s non-repudiation rule as the law in this circuit. We now turn to the other issue presented for en banc review.

III. *Royal Development.*

On en banc review, we have also considered the "rule" of *Royal Dev. Co., Ltd. v. NLRB*, 703 F.2d 363, 369 (9th Cir.1983), that a panel of this court may not adopt a Board decision that conflicts with circuit precedent. The *Mesa Verde* panel stated that *Royal Development* precluded it from adopting *Deklewa* because circuit precedent had followed the *R.J. Smith* approach. *Mesa Verde*, 820 F.2d at 1013.

Both the Board and the circuit courts are charged with interpreting the NLRA and other labor laws. As noted, the Board's interpretation of its statutory mandate is entitled to deference. Also, the Board is free to change its interpretation of the law if its interpretation is rea-

sonable and not precluded by Supreme Court precedent. We should defer to its judgment if reasonable. *See Higdon*, 434 U.S. at 350-51, 98 S.Ct. at 660-61.

The *Royal Development* rule, however, would seem to preclude a three-judge panel of this court from adopting a reasonable interpretation of labor law even though our prior precedent was adopted out of deference to the Board. We note the inconsistency of such a rule with our treatment of *Higdon* and *McNeff* in this case. By holding that these Supreme Court cases are not binding constructions of section 8(f), we recognize the deferential nature of judicial review of administrative decision-making. To accord decisions of our own court greater deference than that given to the Supreme Court, would be anomalous indeed. We hold, therefore, that if prior decisions of this court constitute only deferential review of NLRB interpretations of labor law, and do not decide that a particular interpretation of statute is the only reasonable interpretation, *see United Food*, 108 S.Ct. at 421, subsequent panels of this court are free to adopt new and reasonable NLRB decisions without the requirement of en banc review.[11]

Our holding is consistent with this and other circuits' past adoption of NLRB decisions which conflicted with prior circuit case law. For example, in *Blueflash Express*, 109 N.L.R.B. 591, 592 (1954), the Board examined the

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[11] On a pure question of statutory construction, our first job is to try to determine congressional intent, using "traditional tools of statutory construction." If we can do so, then that interpretation must be given effect . . . however, where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute . . . . Under this principle, we have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute."

Id. (citations omitted).

issue of "interrogations" by employers of employees' views about unions. The Board articulated an "all-the-circumstances" test to determine whether the interrogation restrained or interfered with employee rights under section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). This court adopted this standard in numerous cases. *See, e.g., NLRB v. Brooks Cameras*, 691 F.2d 912, 919 (9th Cir. 1982); *Lippincott Indus. v. NLRB*, 661 F.2d 112, 114 (9th Cir.1981); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir.1977). Later, the Board moved away from the "all-the-circumstances" test and adopted a per se rule that any such interrogation was unlawful under the Act. *See, e.g., PPG Indus.*, 251 N.L.R.B. 1146, 1147 (1980); *Paceo, a Div. of Fruehauf Corp.*, 237 N.L.R.B. 399, 400 (1978), *vacated in part and remanded in part*, 601 F.2d 180 (5th Cir.1979). The Ninth Circuit in turn has applied the per se rule. *See, e.g., J.M. Tanaka Constr., Inc. v. NLRB* 675 F.2d 1029, 1037 (9th Cir. 1982); *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 599 n. 1 (9th Cir.1979), *cert. denied*, 445 U.S. 915 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980). Despite this conflicting case law, a panel of this circuit in *Hotel Employees and Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006, 1009 (9th Cir.1985), affirmed the Board's return to the "all-the-circumstances" test.[12] The court found that the current approach was a consistent and reasonable interpretation of the Act and deferred to the Board's decision to change its standard. The court did not find that it was bound by the prior circuit precedents.

There are strong policy reasons why we should limit the *Royal Development* rule. First, *Royal Development* hinders the policy of judicial deference to "the Board's reasonable interpretations and applications of the [Na-

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[12] *Hotel Employees* did not cite the *Royal Development* rule. The court noted that the "all-the-circumstances" test "conflict[ed] with a few Ninth Circuit cases" following a per se rule. *Id.* at 1008.

tional Labor Relations] Act." *Action Automotive*, 469 U.S. at 496, 105 S.Ct. at 988. As the Supreme Court recently recognized in *Chevron*, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." 467 U.S. at 844, 104 S.Ct. at 2782. This is especially true " 'whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.' " *Id.* (quoting *United States v. Shimer*, 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)). Deference is due even when the administrative agency changes its interpretation of statutes. *See Higdon*, 434 U.S. at 351, 98 S.Ct. at 660. *Royal Development* inhibits this court in affording the deference due to reasonable NLRB interpretations where the circuit has ruled on an earlier interpretation, therefore impeding the NLRB's ability to change its interpretation in accord with its experience and altered objectives.

Second, *Royal Development* prevents the NLRB from enacting consistent, nationwide policies. Under the *Royal Development* rule, our circuit will be frozen on certain interpretations of NLRB statutes, whereas other circuit would not, depending on the random occurrence of cases within the circuits. For example, if all circuits were to follow *Royal Development*, the Ninth Circuit might be bound by the NLRB's 1963 interpretation of a given statute, the Second Circuit might follow a completely different 1971 interpretation, and the Fifth Circuit might be bound by a third interpretation handed down in 1984. Conversely, in the absence of *Royal Development* the NLRB could gain simultaneous and timely application of its interpretation throughout the country, thereby acting with the flexibility and policymaking power granted to it by Congress.

Third, *Royal Development* is likely to encourage unjustified appeals and delay by increasing the uncertainty as to the law that ultimately will be applied in any case where the NLRB has changed its interpretation after a circuit precedent upholding a prior circuit interpretation. Under *Royal Development*, the appeals court initially will apply the circuit's prior interpretation, but it is always possible that an en banc court will reconsider the issue and adopt the new interpretation if it is reasonable.

Fourth, it is likely that time constraints will preclude en banc review of most cases and *Royal Development*, therefore, will prevent the circuit from adopting the NLRB's reasonable interpretations of the statutes that it is entrusted to administer. Even if we make the improbable assumption that en banc courts will be able to review every case presenting a new NLRB interpretation, the en banc procedures required by *Royal Development* would constitute an enormous, unnecessary waste of time. The determination in the first instance whether an NLRB interpretation is reasonable is entrusted to three-judge panels, and such panels may easily make this same determination in cases where another panel already has addressed a prior interpretation of the statute.[13] For reasons of efficiency, en banc review concerning the reasonableness of an NLRB interpretation should be a matter of last resort, not the initial means of considering the new interpretation.

In summary, if a panel finds that a NLRB interpretation of the labor laws is reasonable and consistent with those laws, the panel may adopt that interpretation even if circuit precedent is to the contrary. This is so, however, only where the precedent constituted deferential review of NLRB decisionmaking. If the precedent held either that the NLRB decision was unreasonable or the

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[13] As noted above, such cases do not merit en banc review because there exists no conflict with prior decisions.

only possible interpretation of the statue, then the *Royal Development* rule will apply.

We now turn to the final issue on en banc review—whether *Deklewa* should be applied retroactively to this case.

IV. *Retroactivity.*

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the Supreme Court articulated the three factors applicable to retroctivity analysis:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clear foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-07, 92 S.Ct. at 355 (citations omitted).

We note that *Deklewa* overrules clear precedent that the employer in *Mesa Verde* obviously relied on in repudating the pre-hire agreements. We remand to the *Mesa Verde* panel to apply the *Chevron* factors.

CONCLUSION

We adopt *Deklewa* as the law of this circuit and hold that pre-hire agreements may not be unilaterally re-

pudiated by either a union or an employer prior to its termination or absent an election among the appropriate bargaining unit's employees to reject the union. We find that *Deklewa* better advances the statutory objectives of the NLRA, better serves the goals of employee free choice and labor-management stability, and assists in reducing litigation fostered by prior precedent. We limit the *Royal Development* rule to cases where this circuit has found an NLRB interpretation unreasonable or the only possible construction of statute. We REMAND the issue of retroactivity to the *Mesa Verde* panel to consider that issue in light of *Chevron Oil Co. v. Huson.*

REMANDED.

WALLACE, Circuit Judge, dissenting:

In *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Supreme Court set forth a two-step review of an agency's construction of the statute which it administers:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43, 104 S.Ct. at 2781-82 (footnotes omitted). The Court has reaffirmed the continuing vitality of both

the first step under *Chevron*, *see, e.g.*, *Bethesda Hospital Association v. Bowen*, —— U.S. ——, 108 S.Ct. 1255, 1258, 99 L.Ed.2d 460 (1988); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 1220-21, 94 L.Ed.2d 434 (1987), and the second step. *See, e.g.*, *Fall River Dyeing & Finishing Corp. v. NLRB*, —— U.S. ——, 107 S.Ct. 2225, 2235, 96 L.Ed.2d 22 (1987) (cited in *NLRB v. United Food & Commercial Workers Union*, —— U.S. ——, 108 S.Ct. 413, 421, 98 L.Ed.2d 429 (1987), as a case in which the Court applied the second step under *Chevron*). When the Court interprets a statute under the first step of *Chevron*, its interpretation is conclusive and authoritative.

Although I believe the question is close concerning the Supreme Court's conduct in the pre-*Chevron* cases of *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 103 S.Ct. 1753, 75 L.Ed.2d 830 (1983), and *NLRB v. Local Union No. 103, International Association of Bridge Structural & Ornamental Iron Workers*, 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed.2d 586 (1978), I am persuaded that the Supreme Court conclusively and authoritatively interpreted section 8(f), rather than merely deciding that the NLRB's interpretation was permissible. Thus, as a circuit court, we are bound to follow the Court's interpretation. Therefore, I concur in the result reached by Judge Hug and dissent from the majority opinion.

HUG, Circuit Judge, with whom Circuit Judges BRUNETTI and KOZINSKI concur, dissenting:

I respectfully dissent.

The principal issue in this case is whether a prehire agreement entered into under the authority of section 8(f) of the National Labor Relations Act ("NLRA") can be repudiated by the employer until the union establishes majority status. The Supreme Court, in a unanimous opinion and in language that could not be clearer, has held that it can be. The Court stated:

> A § 8(f) prehire agreement is subject to repudiation until the union establishes majority status.

Jim McNeff, Inc. v. Todd, 461 U.S. 260, 271, 103 S.Ct. 1753, 1759, 75 L.Ed.2d 830 (1983).

Despite this clear statement in *McNeff*, the majority upholds a contrary view of the NLRB. It dismisses the language in *McNeff* on the ground that the Court there merely followed its prior decision, *NLRB v. Iron Workers*, 434 U.S. 335, 98 S.St. 651, 54 L.Ed.2d 586 (1978) (hereinafter *Higdon*). The majority feels, in turn, that the Court in *Higdon* did not actually construe section 8(f), but instead simply held that the Board's construction of section 8(f) was within a range of possible reasonable constructions. Such a limited holding would leave room for other, equally reasonable, constructions of the Act. Thus the majority contends that a new construction by the Board, even one which is directly contrary to the pronouncement of the Supreme Court in *McNeff*, is permissible if it can be justified as being reasonable. *See* Opinion at 1129-1131.

I part company from the majority because I believe the Supreme Court *did* definitively construe section 8(f) in both *Higdon* and *McNeff*, although the Court may have given deference to the Board's interpretation in doing so. The Court did not, as the majority suggests, decide only that the Board's interpretation was a reasonable construction of the Act subject to change at the agency's whim. Instead—after giving heightened consideration to the Board's arguments—the Court passed judgment upon the meaning of section 8(f) and such judicial interpretation is binding under our principle of stare decisis.

I.

This case presents a vital question concerning the relative roles of the judiciary and administrative agencies in construing statutes, the importance of which, in

my view, transcends the particular point of labor law at issue. We are here faced with a question of pure stautory interpretation. We are concerned with determining Congressional intent. Specifically, our inquiry is how Congress intended a prehire agreement to operate. The Supreme Court in *Higdon* and *McNeff* interpreted the statute after giving some deference to the interpretation of the NLRB, the agency charged with administering the Act. The NLRB, at that time, gave persuasive arguments that Congress intended to allow either party to repudiate the contract until the Union achieved majority status.

The NLRB's position, however, was by no means binding on the Court. Congress did not delegate to the NLRB the discretion to determine how a prehire agreement was to operate, allowing the Board to treat the agreement in any manner that the Board considered would best implement sound labor policy. Congress simply enacted section 8(f), which was to be interpreted by the courts. That section has been interpreted by the highest court authority—the United States Supreme Court—after careful consideration of the statutory language, legislative history, and the interpretation placed upon it by the agency charged with its enforcement. That interpretation must stand until it is overruled by the Supreme Court or until Congress amends the statute.

I therefore believe we are bound by *Higdon* and *McNeff* to reject the Board's new *Deklewa* rule. The majority apparently believes that the stare decisis value of *Higdon* and *McNeff* is vitiated by virtue of the deference accorded in those cases to the Board's interpretation of the Act. I submit that the majority misconceives the true nature of the deference granted in those cases. An examination of the role of deference in the two cases reveals that the Court did, in fact, render its own interpretation of section 8(f), and, in doing so, created precedent to which we must adhere.

Confusion in this area is quite understandable. A vast number of cases discuss the proper deference accorded to an agency's interpretation of a statute, but, as one distinguished author notes, such discussions are often laced with "verbalisms [that] have rarely been helpful and have usually been harmful; [and] are often uncertain, conflicting and even confusing." 5 K. Davis, *Administrative Law Treatise*, § 29.1, at 334 (2d ed. 1984). Behind the confusing verbiage lies, I believe, two very distinct principles of judicial deference to agencies. Moreover, the two breeds of deference have vastly different effects on the principle of stare decisis. It is evident to me that the majority has mistaken one type of deference for the other, and thereby misjudged the stare decisis effect of both *Higdon* and *McNeff*.

II.

The type of deference underlying the Supreme Court's ruling in *Higdon* and *McNeff* is appropriate in cases when the Court confronts a pure question of statutory construction. When the Court seeks to ascertain the meaning of an ambiguous statutory provision, it gives special consideration to the viewpoint of the agency charged with implementing the statute. Such deference is due because the agency "constitute[s] a body of experience and informed judgment to which courts . . . may properly resort for guidance." *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 499, 78 S.Ct. 851, 862, 2 L.Ed.2d 926 (1958). As Davis notes, the deference given by judges for interpretations of administrators "is not at all surprising": it is simply a matter of "[d]eference of generalists for the views of specialists [which] could be deemed a part of the law of nature. . . ." K. Davis, supra, at 400.

However, such deference does not intrude on the Court's role as the final authority on questions of statutory construction. As the Supreme Court stated in *Securi-*

ties Indus. Ass'n v. Board of Governors, 468 U.S. 137, 143, 104 S.Ct. 2979, 2982, 82 L.Ed.2d 107 (1984), "Judicial deference to an agency's interpretation of a statute 'only sets "the framework for judicial analysis; it does not displace it."'" *See also Barlow v. Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 837, 25 L.Ed.2d 192 (1970) ("[When] the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the [agency], but by judicial application of canons of statutory construction."); *Batterton v. Francis*, 432 U.S. 416, 424, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448 (1977) ("[A]dministrative interpretations of statutory terms are given important but not controlling significance.").

Over the years, the Supreme Court has repeatedly affirmed its role as the final authority on issues of statutory construction. *See, e.g., SEC v. Sloan*, 436 U.S. 103, 118, 98 S.Ct. 1702, 1711, 56 L.Ed.2d 148 (1978) ("[T]he courts are the final authorities on issues of statutory construction [and] 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions. . . .'" (Citations omitted.)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987). ("The judiciary is the final authority on issues of statutory construction. . . .") (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n. 9, 104 S.Ct. 2778, 2781 n. 9, 81 L.Ed.2d 694 (1984)); *Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981); *Bureau of Alcohol, Tobacco and Firearms v. F.L.R.A.*, 464 U.S. 89, 97, 104 S.Ct. 439, 444, 78 L.Ed.2d 195 (1983).

It is equally well-settled that deference is not due to an agency's construction of a statute where the statutory language is clear. *United States v. Missouri Pacific R. Co.*, 278 U.S. 269, 280, 49 S.Ct. 133, 137, 73 L.Ed. 322

(1929); *Swift Co. v. United States*, 105 U.S. 691, 695, 26 L.Ed. 1108 (1881); *United States v. Tanner*, 147 U.S. 661, 663, 13 S.Ct. 436, 437, 37 L.Ed. 321 (1893). When the statutory language is ambiguous, the amount of weight given to the agency's interpretation depends on a variety of factors, such as the thoroughness of the agency's consideration, whether the agency's construction has been consistent over the years, and whether the timing of the agency's construction was contemporaneous with the passage of the statute. *United States v. Sweet*, 189 U.S. 471, 473, 23 S.Ct. 638, 638, 47 L.Ed. 907 (1902); *Federal Maritime Bd.* 356 U.S. at 499-500, 78 S.Ct. at 862-63; *United States v. Johnston*, 124 U.S. 236, 253, 8 S.Ct. 446, 455, 31 L.Ed. 389 (1888); *United States v. American Trucking Ass'ns., Inc.*, 310 U.S. 534, 549, 60 S.Ct. 1059, 1067, 84 L.Ed. 1345 (1940); *United States v. Leslie Salt Co.*, 350 U.S. 383, 396-97, 76 S.Ct. 416, 423-24, 100 L.Ed. 441 (1956). *See also Cardoza-Fonseca*, 107 S.Ct. at 1221 n. 30 (less deference accorded to agency when agency has changed its mind).

With these principles in mind, it is evident that a court faced with an issue of pure statutory interpretation must make its own independent judgment as to the meaning of the statute. Because it is the final authority on such matters, it cannot delegate its function to the agency. Though a court may give a certain amount of deference to the agency's interpretation of the statute, its analysis must not end there. Rather, the court must either adopt the agency's position as its own interpretation of the Act, or adopt a construction other than that promoted by the agency. In either case, the court makes its own final judgment as to the meaning of the statute. The court's determination as to the meaning of the statute is no less its own simply because it accorded deference to the agency and accepted the agency's construction.

Because courts cannot escape their function as final authorities on issues of statutory interpretation, their

decisions on such matters are binding regardless of the degree of deference given to the agency in reaching the decision. As the Supreme Court noted in *Estate of Sanford v. Commissioner*, 308 U.S. 39, 60 S.Ct. 51, 84 L.Ed. 20 (1939), "[W]e should be . . . free to reject [an administrative] practice when it conflicts with our own decisions. A change of practice . . . will be accepted as controlling *when consistent with our decisions.*" *Id.* at 53, 60 S.Ct. at 60 (emphasis added). In a similar vein, Justice Stevens noted the binding effect of the Supreme Court's decisions of statutory interpretation in *Shearson American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987), where he stated:

> Gaps in the law must, of course, be filled by judicial construction. But after a statute has been construed, either by this Court or by a consistent course of decision by other federal judges and agencies, it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself.

Id. 107 S.Ct. at 2359 (J. Stevens, concurring and dissenting). To summarize, in cases where the Supreme Court confronts an issue of pure statutory interpretation, the deference accorded to the agency's construction of the statute does not impinge in the least upon the stare decisis effect of the decision. The decision is binding upon the agency and upon lower courts.[1]

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[1] Of course, after operating under a decision of the Court, the agency may persuade the Court that the Court's initial construction of the statute was erroneous, and may urge the Court to adopt an alternative construction. The Court may be persuaded to do so, for the agency's experience in implementing the statute under the former construction may demonstrate that such a construction could not have been intended by Congress in light of the difficulties it poses for implementation, or in light of other policy reasons unveiled since the Court's decision. But for the Court to adopt the later agency position, it would have to overrule its prior decision adopting the former construction.

III.

The other type of deference is markedly different and readily distinguishable from the type discussed above. This is the deference given to an administrative agency when Congress has delegated to the agency the authority to further define the specifics of a general proposition of law. Unlike the deference discussed above, when this type of deference underlies a court's decision, stare decisis is affected. Exploring the roots of such deference demonstrates why.

In some instances, Congress purposefully does not resolve competing economic or social interests in particular areas and instead leaves this to the agency. In other situations, Congress enacts quite general provisions, with the specifics to be filled in by the agency. As noted in *Chevron*,

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
>
> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . .

Chevron, 467 U.S. at 843-44, 104 S.Ct. at 2783 (footnotes omitted). Thus there are two categories of delegation: (a) explicit delegation; and (b) implicit delegation.

The *Chevron* case itself provides excellent examples of both explicit and implicit delegation. The case concerned the Clean Air Act, the administration of which is entrusted to the Environmental Protection Agency ("EPA"). Congress directed the EPA to promulgate National Ambient Air Quality Standards, to publish a list of categories of pollution sources, and to establish new source performance standards for each. See *Chevron*, 467 U.S. at 846, 104 S.St. at 2783. This was an *express* delegation of authority by Congress to develop the specifics of general legislation. At issue in *Chevron* was the meaning of the statutory term "stationary source." There had been no specific delegation of authority to define that term. However, the Court found that Congress intended that there not be a static judicial definition of the term but, instead, a flexible definition to be applied by the EPA in order to carry out the general policy of the Act. Thus the Court found an *implicit* delegation of authority to the EPA to determine the meaning of "stationary source." *See id.* at 862-66, 104 S.Ct. at 2791-93.

When there exists an *explicit* delegation of authority to fill gaps in the legislation, this function is generally fulfilled by the adoption of regulations. When the agency enacts regulations or procedures designed to apply the statute to various factual situations its rule-making assumes a quasi-legislative character. *See Batterton*, 432 U.S. at 424 n. 8, 97 S.Ct. at 2405 n. 8 (" 'Administration, when it interprets a statute so as to make it apply to particular circumstances, acts as a delegate to the legislative power.' ") (Citations omitted.) *See also NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31, 64 S.Ct. 851, 860-61, 88 L.Ed. 1170 (1944); *State of Montana v. Clark*, 749 F.2d 740, 745 (D.C.Cir.1984), *cert denied*, 474 U.S. 919, 106 S.Ct. 246, 88 L.Ed.2d 255 (1985). A court, in reviewing such regulations, is not actually confronted with an issue of statutory interpretation, for

there is nothing in the *statute* per se to interpret: Congress left a gap, entrusting the agency to fill it. A reviewing court is not free to set aside those regulations simply because it would have refined the statute in a different manner. *Batterton*, 432 U.S. at 425, 97 S.Ct. at 2405. Thus, the judicial task when reviewing an agency's regulations designed to fill a gap left by Congress differs fundamentally from the judicial task in determining the meaning of the statute. In the former case, the court does not confront an issue of statutory interpretation and, thus, its authority is limited to reviewing the regulations to ensure that Congress gave the agency the power to make such regulations, and to ensure that the regulations are consistent with the statutory scheme. In the latter case, the court is the final authority as to the statute's meaning and may defer to the agency's interpretation as it deems appropriate, but its holding reflects a judicial construction of the statute. In both types of cases, the principle of deference is employed by courts, but the principle operates very differently in each context.

When the delegation from Congress is *implicit* rather than explicit, the principle is the same. In *Chevron*, the Court determined that the term "stationary source" in the Clean Air Act had been intended by Congress as a flexible definition to be refined by the EPA, to which it had entrusted wide discretion in administering the legislation. Thus, the Court's inquiry was only whether the EPA's construction of that term was reasonable. As in the case of an express delegation, where Congress contemplates future regulations, the Court deferred to the EPA's interpretation of the term as being a reasonable exercise of the delegated authority. *Chevron*, 467 U.S. at 865-66, 104 S.Ct. at 2793. This differs markedly from the deference given to an agency in resolving a pure question of statutory interpretation.

As an example of how the principle of deference operates in each context, it is useful to contrast *Chevron* with

Cardoza-Fonseca. In *Chevron*, the Court determined that Congress left a gap in the statute for the agency to fill; consequently, the Court exercised very limited review of the agency's regulations. *Chevron*, 467 U.S. at 845, 104 S.Ct. at 2783. In *Cardoza-Fonseca*, however, the Court found that the question before it was a "pure question of statutory construction for the courts to decide" and repected the agency's interpretation of the statute. *Cardoza-Fonseca*, 107 S.Ct. at 1220-21.

As previously noted, stare decisis operates with full force whenever a court decides a question of statutory interpretation, regardless of the amount of deference given to the agency in reaching its decision.

IV.

With this framework of statutory analysis in mind, the next step is to examine what the Supreme Court actually did in the *Higdon* and *McNeff* cases, when it construed section 8(f) of the NLRA. Did the Court, as I maintain, make a determination of *Congressional intent* as to the type of contract that a prehire agreement was meant to be? Or did the Court merely find that Congress delegated to the NLRB the task of determining the contractual nature of a prehire agreement, and that the NLRB's determination was reasonable, thus leaving the agency free to adopt other positions at a later time?

I begin with *Higdon*. In that case, the Court held that the Board properly applied section 8(b)(7)(C) of the NLRA to a section 8(f) prehire agreement. The Board had held that picketing to enforce a section 8(f) prehire agreement was tantamount to recognitional picketing, and that section 8(b)(7)(C) was violated when the union failed to request an election within 30 days.

In analyzing the Court's discussion of section 8(f) within the framework of statutory analysis I have set forth above, it is apparent to me that the interpretation of section 8(f) is one of pure statutory construction.

The deference given to the Board was that of considering the Board's position in arriving at that construction.

There is no indication that there was either an express or implicit delegation to the Board to refine standards or to fill in gaps in section 8(f). Nor is it a situation in which the statute is merely being applied to the facts of a particular case. It is purely a construction of what Congress intended in enacting section 8(f). There are extensive references in *Higdon* to the legislative history and statutory policy of Congress.[2] The Court concluded

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[2] *See e.g.*,

> The Board's position is rooted in the generally prevailing statutory policy that a union should not purport to act as the collective bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of the employees in the unit.
>
> . . . .
>
> As for § 8(b)(7), which, along with § 8(f), was added in 1959, its major purpose was to implement one of the Act's principal goals—to ensure that employees were free to make an uncoerced choice of bargaining agent. As we recognized in *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 [95 S.Ct. 1830, 44 L.Ed.2d 418] (1975), "[o]ne of the major aims of the 1959 Act was to limit 'top down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." *Id.*, at 632 [95 S.Ct., at 1840], and references cited therein.
>
> *Congressional concern* about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry. (n. 10)
>
> (n. 10) *Congress* was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle. Representative Barden, an important House floor leader on the bill and a conferee, introduced as an expression of legislative intent Senator Kennedy's explanation the year before of the voluntary nature of the prehire provision[.]

Higdon, 434 U.S. at 344-48, 98 S.Ct. at 657-59 (emphasis added).

that although the Act made prehire agreements in any other industry an unfair labor practice, Congress intended to create an exception for the construction industry. The Court found that Congress authorized an employer and a union to enter into a voluntary prehire agreement in the construction industry without the union having achieved majority status, and that Congress did not give prehire agreements any other status within the NLRA. It was a voluntary agreement that could be repudiated until the union achieved majority status.

The majority cites the following language in the *Higdon* opinion.

> We have concluded that the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections.

Id. 434 U.S. at 341, 98 S.Ct. at 656 (footnote omitted). The majority interprets this language to mean that the Court did not "independently construe the reach and scope of section 8(f)." Maj. op. at 1129-30. I do not read it that way. In my mind, the Court simply articulated the deference it gave to the Board's views in reaching its *own* interpretation of the statute.

Certainly, if *Higdon* leaves any doubt, there is abundant language in *McNeff* to demonstrate that, in both cases, the Court arrived at its own interpretation of Congressional intent in enacting section 8(f). The issue in *McNeff* was whether the monetary obligations of a section 8(f) prehire agreement could be enforced prior to repudiation. The opinion repeatedly acknowledged that a section 8(f) agreement was voidable. The references throughout *McNeff* are to the intent of *Congress* in enacting section 8(f). For example, the Court stated:

> In unholding the Board's view that a union commits an unfair labor practice by picketing to enforce

a prehire agreement before it has attained majority status, we noted in *Higdon* that this view protects two interests that *Congress intended* to uphold when it enacted § 8(f).

. . . .

[O]ur decision in *Higdon* promotes *Congress'* "*intention* . . . that prehire agreements were to be arrived at voluntarily. . . ." *Higdon*, 434 U.S., at 348, n. 10 [98 S.Ct., at 659, n. 10]. *In accord with this intention*, we approved the Board's conclusion that a "prehire agreement is voidable" "until and unless [the union] attains majority support in the relevant unit." *Id.*, at 341 [98 S.Ct., at 655]. Allowing the union to picket to enforce a prehire agreement before it attains majority status is plainly inconsistent with the voidable nature of a prehire agreement.

The concerns with the § 7 rights of employees to select their own bargaining representative and *our fidelity to Congress' intent* that prehire agreements be *voluntary—and voidable*—that led to our decision in *Higdon* are not present in this case.

. . . .

In a § 301 suit, the District Court merely enforces a contract entered into by the employer—a contract that *Congress has legitimated* to meet a special situation even though employees themselves have no part in its negotiation or execution. Such enforcement does not grant the plaintiff union a right otherwise enjoyed only by a majority union except in the very narrow sense, *expressly intended by Congress*, that employers and minority unions in the construction industry do not violate the Act by entering into prehire agreements. There is no sense in which respondents' contract action has a recognitional purpose like that forbidden in *Higdon*.

Neither does respondents' § 301 action trench on the *voluntary and voidable characteristics of a § 8(f)*

> *prehire agreement.* It is clear in this case that petitioner entered into the prehire agreement voluntarily. Moreover, although the *voidable nature of prehire agreements clearly gave petitioner the right to repudiate* the contract, it is equally clear that petitioner never manifested an intention to void or repudiate the contract. . . . Whatever may be required of a party wishing to exercise its *undoubted right to repudiate a prehire agreement* before the union attains majority support in the relevant unit, no appropriate action was taken by petitioner to do so in this case. Consequently, respondents' suit does not enervate the voluntary and voidable characteristics of the prehire agreement.
>
> Apart from not offending the concerns noted in *Higdon*, allowing a minority union to enforce overdue obligations accrued under a prehire agreement prior to its repudiation vindicates the *policies Congress intended* to implement in § 8(f). *Congress clearly determined* that prehire contracts should be lawful to meet problems unique to the construction industry.

Id. 461 U.S. at 267-71, 103 S.Ct. at 1757-59 (footnotes omitted) (emphasis added).

Throughout the opinion, the Court repeatedly referred to the prehire agreements as being voluntary and voidable with the undoubted right of a party to repudiate the agreement prior to the union achieving majority status. The constant reference to the "voidable nature" of such agreements serves as a strong reminder that the Supreme Court has decided the issue before us in this case and, in doing so, has discerned the Congressional intent behind section 8(f) and rendered its own independent interpretation of that section. As previously discussed, the Court had no choice but to render its independent construction of section 8(f) for it was faced with a pure question of

statutory construction. The Supreme Court is the final authority on such matters and the deference it gives to the Board's view cannot impinge on the stare decisis effect of its ruling.

V.

The majority points to a line of cases in which this circuit adopted a changed Board position, even in face of prior circuit precedent upholding the former Board position. *See* Opinion at 1135. The cases cited are ones in which we reviewed the Board's test for determining whether an employer's interrogation of an employee regarding union activities violates the employee's rights under section 8(a)(1) of the NLRA. The majority is quite correct in pointing out that the Board over the years changed its test from an "all the circumstances" test to a "per se" rule and back again. Despite the vacillation, and even though we had previously upheld the per se rule, (*see, e.g., NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 599 n. 1 (9th Cir.1979)), we affirmed the Board's return to the "all the circumstances" test in *Hotel Employees & Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006, 1009 (9th Cir.1985).

The majority, however, has again failed to examine the type of deference operating in those cases. Those cases did not involve questions of pure statutory interpretation, but rather questions relating to the Board's application of a statutory provision to the facts in particular cases. Specifically, the cases dealt with the standard developed by the Board to apply section 8(a)(1) of the NLRA to circumstances in which an employer interrogates an employee about the employee's union sympathies. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the [employee organizational] rights. . . ." 29 U.S.C. § 158(a)(1). In applying the statutory proscription on a case-by-case basis, the Board, at different times, developed two different evidentiary requirements. Under the "per se" standard developed by the

Board, any questions concerning union sympathies were deemed inherently coercive in violation of section 8(a)(1). *See Hotel*, 760 F.2d at 1007. Under the "all the circumstances" test, the interrogation was found unlawful only where " '*under all the circumstances* the interrogation reasonably tend[ed] to restrain or interfere with the employees in the exercise of rights guaranteed by the Act.' " *Id.* at 1008 (citation omitted).

These differing standards represent a classic example of the Board *applying* the statute to everyday situations. The review in those cases is directed towards the Board's manner of enforcing the Act, not to the meaning of the statutory language itself. As in all cases which apply the law to everyday circumstances, the proper scope of review of the Board's standard in *Hotel* was "for rationality and consistency with the Act." *Id.* The panel concluded, "A standard which considers the totality of the circumstances surrounding an employee interrogation is a realistic approach to the *enforcement* of section 8(a)(1). It is a standard that is *consistent with the Act* because the Board . . . can determine, on a case-by-case basis, whether all the facts demonstrate coercive behavior." *Id.* at 1009 (emphasis added).

In sum, the line of cases cited by the majority do not provide authority for this court's departure from either Supreme Court precedent or this circuit's precedent in which questions of statutory meaning are decided.[3]

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[3] Another example of the agency changing its position with this court's approval is the Board's treatment of representation elections. Over a period of 20 years, the NLRB changed its position four times on the issue of when a representation election should be set aside on the grounds of misrepresentation. *NLRB v. Best Products Co., Inc.*, 765 F.2d 903, 910 (9th Cir. 1985). The NLRB vacillated between the *Hollywood Ceramics* standard, where an election would be set aside when there was a "substantial departure from the truth," and the *Shopping Kart Food Market* standard, under which an election would not be set aside solely because there had been misrepresentations of fact. *See Best*, 765 F.2d at 910-11

VI.

I agree with the majority that we must treat our own circuit precedent in a manner consistent with our treatment of Supreme Court precedent. The majority achieves its consistency by overruling *Royal Development v. NLRB*, 703 F.2d 363 (9th Cir.1983). My belief is simply that, when a panel of our court decides an issue of pure statutory construction, its ruling is binding on future panels and may be departed from only by an en banc panel. This is so despite the deference accorded to the agency in arriving at that interpretation of the statute.

CONCLUSION

I believe the ramifications of the majority's ruling extend far beyond the area of labor law into the entire realm of administrative law. Underlying the majority's holding is, in my mind, a misconception of the nature of

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(discussing NLRB's changes of policy). In *Best*, this court upheld the Board's adherence to the *Shopping Kart* standard even though the Board had vacillated between the two standards, and even though this court had previously upheld the *Hollywood Ceramics* standard. *See, e.g., NLRB v. Sauk Valley Mfg. Co., Inc.*, 486 F.2d 1127, 1131 (9th Cir. 1973). We recognized in *Best*, "The Board may alter its standards provided that its new rules are both rational and consistent with the Act." 765 F.2d at 912. We noted that the "NLRB has wide discretion to determine representation matters and questions arising during election proceedings," *id.* at 908, and confined our standard of review to two inquiries: (1) "whether the Board acted within an area of regulation committed to it by Congress," and (2) "whether the Board properly applied the correct legal standard." *Id.* at 907. We concluded that there was a " 'reasonable basis in law' for the Board's change of policy" and deferred to the Board's decision. *Id.* at 913. Again, this is the type of deference which is properly employed in reviewing a Board's *application* of the statute to the facts of particular cases. It must not be confused with the deference accorded to an agency's view of the meaning of the statute. As with the line of cases mentioned in the majority opinion, this example provides no support for departing from prior circuit precedent on issues of statutory construction.

deference given to an agency on a purely legal question of statutory interpretation. In the name of administrative deference, the majority would deprive this court of its role of divining Congressional intent behind a statutory provision, and assign that role to the agency charged with administering the statute. The potentially grave consequences resulting from this misapplication of the deference principle need not be enumerated here.

I reiterate my position that *McNeff* and *Higdon* constitute binding precedent which we are obliged to follow. The Supreme Court's holdings, in my view, cannot be dismissed as simply affirming the Board's then-position while leaving room for the Board to adopt the opposite approach at a later point in time. Rather, the Supreme Court in those cases construed section 8(f) and found, after giving a certain amount of deference to the Board's views, that Congress intended prehire agreements to be voidable. We are bound by that determination unless and until such time the Court overrules its prior opinions or Congress amends the statute.

KOZINSKI, Circuit Judge, with whom BRUNETTI, Circuit Judge, joins, dissenting:

"It is, emphatically, the province and duty of the judicial department, to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803). To *Marbury*'s ringing pronouncement the majority would add a codicil: "until and unless the agency charged with administering the law changes its mind." According to the majority, if a federal court relies on an agency's interpretation of a statute, the court's construction is binding only until the agency decides the statute means something else altogether. At that point the court, or a higher court, or a lower court, may—nay, must—follow the agency's new interpretation unless that interpretation is unreasonable. This, I respectfully suggest, results

in a significant shift of authority from the judiciary to the executive branch. Whenever Congress charges an agency, board, commission or department with administering a statute—I would venture to guess that this includes a substantial majority of our most significant federal laws—the judges become the handmaidens of the agency, relegated to deciding not what the law is, but only whether the agency's construction of the law is reasonable.

This is no small change. Courts and agencies are fundamentally different, both institutionally and functionally. Judicial decisionmaking is hedged about with a variety of constitutional safeguards designed to protect it from manipulation by the political branches. In interpreting statutes, courts are bound to find and apply the meaning endowed them by Congress and the President. It is emphatically not the function of courts to read policy content into statutes, or to interpret them in a way that will foser a particular political viewpoint. Administrative agencies, by contrast, are designed to bend with the political winds. The leadership and policy direction of executive departments change with every administration; members of so-called independent agencies are appointed with reference to their political affiliations. Agency officials are expected to rely on their views of public policy in carrying out their responsibilities.

Because judges must read a statute in the way that best reflects its meaning, courts are far slower than agencies in overruling their decisions. Once a circuit interprets a statute, only an en banc panel of the same court or the Supreme Court may adopt a different construction; only the Supreme Court may modify or reverse its own prior construction of a statute. By contrast, agencies can change their outlook as often and easily as a chameleon changes its color. A change of administration may prompt an executive department to

alter its position on a particular piece of legislation overnight. As positions taken by a regulatory agency may hinge on a narrow majority, appointment of a single commissioner may drastically change hte agency's approach to its organic statute.

This difference between the constraints on the judiciary and the broad freedom afforded agencies derives directly from the disparate functions they perform. When courts interpret a statute, they search for its true meaning—and there can never be more than one true meaning. To be sure, reasonable minds may differ as to what that meaning may be; occasionally it may be necessary to correct a judicial decision that misreads that meaning. But in performing their proper function, judges must listen for the voice of the legislature, not to the sound of their own heartbeats. Because courts are bound by the best construction of the statute, they may alter their interpretation only in response to a powerful new insight as to the law's meaning, not because a different panel of judges prefers a different result.

Agencies, on the other hand, may turn on a dime: Their proper function is to fill in policy gaps pursuant to an explicit or implicit delegation of authority from Congress. *See, e.g., Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974) ("[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress"). Where Congress has delegated such authority, the statute becomes a clear vessel which changes its tint as it is filled and refilled by various policy pigments. Because the agency administering the statute is not bound to a single formulation of statutory language, it may make changes without considering whether the new approach more accurately reflects the meaning of the statute.

Both types of decisionmaking processes serve a vital function so long as each is confined to its own sphere. The majority goes astray in conflating the two. This error has the effect of displacing the courts' methodical, deliberate search for a law's meaning with the policy judgment of a politically responsive administrative agency. This is troubling both as a jurisprudential and as a practical matter.

Jurisprudentially, I am troubled by the majority's implicit holding that the meaning of a statute can change in an instant simply because an administrative agency has said so. Statutory meaning is not a matter of hopes or wishes; it is a fact. In settling on a particular interpretation of a statute, the court is saying: "This is the meaning that was actually conferred upon this statute by Congress." In reaching that conclusion, the court looks first at the statute's language and structure, but may also rely on the statute's legislative history and the view of the agency charged with its enforcement. A change in the agency's view alters this calculus and may motivate a reviewing court to reconsider the soundness of its prior interpretation. But a change in an agency's postion cannot automatically alter the meaning Congress gave the statute years earlier.

By reaching the contrary conclusion, the court is, in effect, holding that statutes have no fixed meaning, that in passing laws Congress approves a range of possible interpretations, each as good as the next. While this approach fits in neatly with the popular mythology, conceived and nurtured in legal academies, that words are incapable of conveying precise concepts, it "undermines the basic principle that language provides a meaningful constraint on public and private conduct." *Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir.1988). Needless to say, I disagree with this

approach which, in my view, represents a serious abdication of judicial responsibility.*

And this brings me to the practical problems wrought by today's decision. The en banc court's ruling—should it become the law of the land—will make hundreds, perhaps thousands, of laws that have been conclusively interpreted by the courts subject to uncertainty whenever there is a shift in the political winds. A brief survey of recent cases in which the Supreme Court has relied on an agency's interpretation suggests the scope of the problem. *See, e.g., NLRB v. United Food and Commercial Workers Union, Local 23*, —— U.S. ——, 108 S.Ct. 413, 98 L.Ed.2d 429 (1987) (Brennan, J.) (relying on the NLRB's construction of 29 U.S.C. § 160, section 10 of the National Labor Relations Act, as holding that an order sustaining a settlement is not subject to judicial review); *Lukhard v. Reed*, 481 U.S. 368, 107 S.Ct. 1807, 95 L.Ed.2d 328 (1987) (Scalia, J.) (plurality opinion) (upholding a state interpretation of 42 U.S.C. §§ 601-615 treating personal injury awards as income, rather than resources, for purposes of Aid to Families with Dependent Children, in part because the interpretation was

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* A reassuring inconsistency suggests the majority is not entirely comfortable with its own prescription: Specifically, the majority goes to great pains to demonstrate that *Dekleva's* interpretation of section 8(f) is not merely permissible, but preferable. Majority opinion at 1132-34. Thus, the court observes that "*Dekleva's* literal reading of the second proviso [of section 8(f)] is a *more likely* reading of congressional intent than that given by *R.J. Smith*," *id.* at 1132 (emphasis added), and concludes that "[t]he Board's prior rule, allowing repudiation of such agreements in addition to these explicit statutory protections, has proved unwise." *Id.* at 1133. Such ruminations have no legitimate place within the analytical framework adopted by the majority: If we are bound to follow the Board, we must approve even a poor interpretation of the statute, so long as it falls within the range of permissible meanings. Future courts might be wise to note the majority's concern with what "best serves the interests of employers and employees," *id.* at 1129, and then do as we do, not as we say.

consistent with the Secretary of Health and Human Services' interpretation); *id.* 107 S.Ct. at 1816 (Blackmun, J., concurring) (basing his vote solely on the deference due the Secretary's interpretation of the statute); *Young v. Community Nutrition Institute*, 476 U.S. 974, 106 S.Ct. 2360, 90 L.Ed.2d 959 (1986) (O'Connor, J.) (relying on the Food and Drug Administration's interpretation of 21 U.S.C. § 346 as empowering the FDA to determine when it must promulgate a regulation to control the addition of potentially deleterious substances to food); *United States v. City of Fulton*, 475 U.S. 657, 106 S.Ct. 1422, 89 L.Ed.2d 661 (1986) (Marshall, J.) (relying on the Secretary of Energy's construction of section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825, as permitting him to put new rates for sale of hydroelectric power into effect on an interim basis); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) (White, J., for a unanimous Court) (relying on the Army Corps of Engineers' construction of section 301 and 502 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1362 as covering all fresh water wetlands that are adjacent to other waters of the U.S.); *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 105 S.Ct. 2210, 85 L.Ed.2d 577 (1985) (Stevens, J., for a unanimous Court) (relying on the Secretary of Health and Human Services' definition of "institution for mental diseases" in the Medicaid Act, 42 U.S.C. §§ 1396d(a)(1), (a)(4)(A) and (a)(15)); *Cornelius v. Nutt*, 472 U.S. 648, 105 S.Ct. 2882, 86 L.Ed.2d 515 (1985) (Blackmun, J.) (relying on the Merit Systems Protection Board's definition of "harfmul error" in the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(c)(2)(A)). *See also* Annotation, *Supreme Court's View as to Weight and Effect to Be Given, on Subsequent Judicial Construction, to Prior Administrative Construction of Statute*, 39 L.Ed.2d 942, § 3 (1973) (collecting cases exemplifying the general rule that the Supreme Court affords substantial defer-

ence to the interpretation of a statute by the agency charged with its administration).

Our circuit has deferred to agency construction of statutes in an equally wide range of cases. *See, e.g., Railway Labor Executives' Ass'n v. United States*, 811 F.2d 1327 (9th Cir.1987) (relying on the ICC's definition of the term "new carrier" in 49 U.S.C. § 10901 as including a railroad company with a contract to operate an existing line); *Pathfinder Mines Corp. v. Hodel*, 811 F.2d 1288 (9th Cir.1987) (relying on the Department of Interior Board of Land Appeals' interpretation of 30 U.S.C. § 21 as withdrawing game preserve lands from entry for mining); *Kim v. Meese*, 810 F.2d 1494 (9th Cir.1987) (relying on the INS's interpretation of 8 U.S.C. § 1256 as holding that an alien is obliged to assert all grounds for eligibility when he first applies for adjustment of permanent resident status); *Largo v. Sunn*, 835 F.2d 205 (9th Cir.1987) (relying on the Secretary of Health and Human Services' interpretation of 42 U.S.C. § 602(a)(18) as allowing states to determine eligibility for Aid to Families with Dependent Children on the basis of actual costs); *Washington State Dep't of Game v. ICC*, 829 F.2d 877 (9th Cir.1987) (relying on the ICC's interpretation of section 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d) as requiring prospective trail users to negotiate an agreement with the railroads before using abandoned railroad rights-of-way as wilderness trails); *Marathon Oil Co. v. United States*, 807 F.2d 759 (9th Cir.1986) (relying on the Mineral Management Services's construction of the Mineral Lands Leasing Act, 30 U.S.C. §§ 181-287, as permitting use of a net back valuation formula to determine the well-head value of natural gas for royalty purposes), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1593, 94 L.Ed.2d 782 (1987); *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir.1986) (relying on the Secretary of the Interior's interpretation of section 22(k)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1621

(k), that harvesting restrictions run from the date of the enactment, rather than from the date of conveyance), *cert. denied*, — —U.S. ——, 108 S.Ct. 197, 98 L.Ed.2d 148 (1987).

This handful of examples barely hints at the scope of the problem created by today's decision. If deference means blind adherence to the agency's construction as it meanders through the range of non-irrational meanings, federal judges should plan to take a long holiday and observe from afar as the body of federal law develops without their further meaningful input. A change of this magnitude in the relationship between the judicial and executive branches of government should come from the Supreme Court, if it comes at all. I can only hope that the Court will have occasion for sober reflection on the wisdom of the approach taken by our court today and by the Third Circuit in *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 222, 102 L.Ed.2d 213 (1988).

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 85-1665, 85-2074

MESA VERDE CONSTRUCTION CO.,
Plaintiff-Appellee,

v.

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS,
Defendant-Appellant.

MESA VERDE CONSTRUCTION COMPANY,
Plaintiff-Appellee,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted Aug. 14, 1986

Decided June 23, 1987

Noonan, Circuit Judge, concurred and filed opinion.

Mark R. Thierman and Paul V. Simpson, San Francisco, Cal., for plaintiff-appellee.

Victor J. Van Bourg and Sandra Rae Benson, San Francisco, Cal., for defendants-appellants.

Before NELSON, WIGGINS and NOONAN, Circuit Judges.

WIGGINS, Circuit Judge:

Mesa Verde Construction Company (Mesa Verde) brought actions against the Northern California District Council of Laborers (Laborers) and the Carpenters 46 Northern California Counties Conference Board (Carpenters) seeking a declaration that it was not obligated to arbitrate grievances under the terms of its respective collective bargaining agreements with the unions. Mesa Verde also sought a stay of arbitration proceedings initiated by the Laborers pending resolution of the declaratory judgment action. The district court stayed the arbitration proceeding and ultimately granted Mesa Verde summary judgment in both actions. We affirm.

BACKGROUND

Mesa Verde is a general contractor, specializing primarily in constructing shopping centers in Arizona, California, and Colorado. Mesa Verde typically subcontracts out most of its work except for some carpentry and odd jobs. In 1979 it reached its first agreement with the Laborers, and on June 26, 1980 it signed the contract with the Laborers that is here in dispute. The contract was to remain in effect until June 15, 1983 and would continue thereafter from year to year absent written notice by either party. By the contract's terms Mesa Verde agreed to "comply with all wages, hours, and working conditions set forth in the Laborers' Master Agreement for Northern California. That agreement is a sixty-seven-page contract between the Laborers, the Associated General Contractors of California, Inc. and the Bay Counties General Contractors Association. It sets wage rates for numerous jobs and provides for arbitration, with certain exceptions, of "any dispute concerning the interpretation or applica-

tion of the agreement." On November 17, 1982 Mesa Verde and the Laborers agreed in writing that their 1980 contract would continue in effect until June 15, 1986.

Mesa Verde first entered into a collective bargaining agreement with the Carpenters in August 1979. Through a memorandum agreement Mesa Verde and the Carpenters accepted the Carpenters Master Agreement for Northern California, a forty-nine-page contract between the Carpenters, the Building Industry Association of Northern California, the California Contractors Council, Inc. and the Millwright Employers Association. That agreement sets rates for numerous jobs and provides for arbitration of "[a]ny dispute concerning the relationship of the parties, any application or interpretation of this Agreement." Through a subsequent memorandum agreement executed in June 1980 the parties accepted the new June 16, 1980 to June 15, 1983 Carpenters Master Agreement. On September 8, 1982 Mesa Verde and the Carpenters early extended the master agreement to June 15, 1986, with certain modifications limiting wage increases and providing more flexible working conditions for Mesa Verde.

Mesa Verde informed the unions of its intent to abrogate its agreements with them in May of 1984. At the time Mesa Verde was working on a project in Hercules, California, at which it employed members of both unions. Mesa Verde notified the Carpenters of its repudiation through a May 8, 1984 letter and notified the Laborers through a May 15, 1984 letter. In late May or early June of 1984, after its notice to the unions, Mesa Verde started another project in Orland, California without union workers, in contravention of the collective bargaining agreements, if they were still in effect. Both unions gave Mesa Verde notice of grievance and requested arbitration regarding Mesa Verde's contractual obligations for the Orland project. Mesa Verde then brought suit against

both unions seeking a declaration that it need not comply with the agreements with regard to projects begun after its repudiations in May 1984. Mesa Verde did not seek a declaration of its obligations to the unions at the ongoing Hercules project.

The district court stayed the Laborer's arbitration proceeding pending resolution of the declaratory judgment action and later granted Mesa Verde summary judgment. *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 598 F.Supp. 1092 (N.D.Cal. 1984). The court, in an unpublished opinion, also granted Mesa Verde summary judgment against the Carpenters. The court held that the collective bargaining agreements at issue were construction industry "prehire" agreements and that therefore, under 29 U.S.C. § 158(f), Mesa Verde's May 1984 letters were sufficient to effectively repudiate the agreements with respect to future projects. The court denied a subsequent motion of the Laborers to vacate its judgment and grant the Laborers additional discovery to demonstrate the existence of a core group of employees. 602 F.Supp. 327 (N.D.Cal.1985).

The unions in this consolidated appeal contest the following: (1) the district court's jurisdiction; (2) the court's stay of arbitration proceedings; and (3) the court's holding that Mesa Verde effectively repudiated its agreements with the unions as to future projects.

ANALYSIS

I. JURISDICTION

We review the district court's determination of its subject matter jurisdiction de novo. *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 549 (9th Cir.1984). The unions first argue that the resolution of this case requires determinations of issues within the primary jurisdiction of the National Labor Relations

Board (NLRB). However, the determination of repudiation of a pre-hire agreement is not within the NLRB's primary jurisdiction, and the district court had jurisdiction to declare whether Mesa Verde repudiated. *Northwest Adm'rs, Inc. v. Con Iverson Trucking, Inc.*, 749 F.2d 1338, 1340 (9th Cir.1984); *accord John S. Griffith Constr. Co. v. United Bhd. of Carpenters & Joiners*, 785 F2.d 706, 710 (9th Cir.1986). The court also had jurisdiction to determine the effectiveness of the repudiations. Although this determination involved an employee representational issue usually within the primary jurisdiction of the NLRB—whether Mesa Verde had a "permanent and stable" work force, the majority of which supported the unions, *see infra* section III—the district courts have jurisdiction to determine "a union's *past* representational status." *United Bhd. of Carpenters & Jointers Local 2247 v. Endicott Enters.*, 806 F.2d 918, 921 (9th Cir.1986). The district court in this case determined Mesa Verde's work force status for the period prior to its May 1984 repudiations; its jurisdiction thus falls within the past representational status exception recognized by *Endicott*.

The unions also argue that their respective collective bargaining agreements with Mesa Verde required that the issue of Mesa Verde's repudiation be resolved through arbitration and not by the district court.[1] This court in *Ion Construction Co. v. District Council of Painters No. 16*, 803 F.2d 1050, 1051 (9th Cir.1986), recently stated the rule "that, as between the court and an arbitrator, it is the former that should determine the effectiveness of an employer's alleged repudiation of a prehire agreement." The rationale for this rule is that "[i]f the Court finds that the employer's repudiation was effective, then there is no longer any agreement to arbitrate

[1] The district court held that it and not the arbiter could properly resolve the repudiation issue because the right to repudiate was statutory rather than contractual.

disputes between the parties." *Griffith Constr.*, 785 F.2d at 712 n.5 (quoting *Ion Constr. Co. v. District Council of Painters No. 16*, 593 F.Supp. 23, 238 (N.D.Cal.1984), *aff'd*, 803 F.2d 1050 (9th Cir.1986)). *Ion Construction* and *Griffith Construction* control this case.[2]

The district court had jurisdiction to determine both whether Mesa Verde repudiated its collective bargaining agreements with the unions and whether, based on the union's representational status during the period before the repudiations, the repudiations were effective.

II. STAY OF ARBITRATION PROCEEDINGS

The Laborers argue that the district court's stay of arbitration proceedings pending final disposition of the declaratory judgment action constituted a restraining order of a labor dispute in violation of the Norris-LaGuardia Act, 29 U.S.C. § 101. The Laborers do not say, and we cannot see, how the stay, even if erroneous, affected the final judgment of the district court. Even if the district court had permitted arbitration to continue and the Laborers obtained a favorable arbitration award prior to summary judgment, an award resolving issues properly within the district court's jurdisdiction would have had no preclusive effect on the district court. *See Ion Constr. Co.*, 803 F.2d 1050 (vacating arbitration award resolving issue within district court's and not arbitor's jurisdiction). Because the stay by its own terms was lifted upon final disposition of the declaratory judgment action, this court has available no effec-

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[2] We note, however, the seeming tension between the *Ion Construction* and *Griffith Construction* decisions in the pre-hire context and the general federal policy favoring arbitration and permitting the arbitration of the issues of contract termination and repudiation. *See, e.g., California Trucking Ass'n v. Brotherhood of Teamsters & Auto Truck Drivers Local 70*, 679 F.2d 1275, 1282 (9th Cir.), *cert. denied*, 459 U.S. 970, 103 S.Ct. 299, 74 L.Ed.2d 281 (1982). *See generally AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).

tive relief to redress the alleged error. We therefore *sua sponte* reject the Laborer's argument as moot. *See AcGuirre v. S.S. Sohio Intrepid*, 801 F.2d 1185, 1189 (9th Cir.1986).

III. REPUDIATION

Pre-hire agreements are specially recognized collective bargaining agreements in the construction industry. These agreements provide an exception to the general rule that an employer may not bargain with unions that do not enjoy the support of the majority of workers in the bargaining unit. *See* 29 U.S.C. § 158(f). An employer may negotiate a pre-hire agreement with a non-majority union, but either party may repudiate the agreement until the union achieves majority support in the appropriate employee bargaining unit, transforming the pre-hire agreement into a fully binding collective bargaining agreement. *United Bhd. of Carpenters & Joiners Local 2247 v. Endicott Enters.*, 806 F.2d 918, 920-21 (9th Cir.1986). The method of establishing a union's majority support depends on the nature of the work force covered by the agreement:

> This circuit recognizes two methods of demonstrating status. If the agreement covers a permanent and stable unit of employees, the contract is converted into a binding agreement covering all employees from the time the union establishes majority support. Once a majority of the company's employees belong to the union, a rebuttable presumption of the union's majority status is created.
>
> If an employer has a stable work force and hires on a job-to-job basis, "the employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites."

NLRB v. Pacific Erectors, Inc., 718 F.2d 1459, 1463 (9th Cir.1983) (citations omitted) (quoting *NLRB v.*

Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, 434 U.S. 335, 345, 98 S.Ct. 651, 657, 54 L.Ed.2d 586 (1978); *accord International Bhd. of Elec. Workers, Local 441 v. KBR Elec.*, 812 F.2d 495, 497-98 (9th Cir.1987).

The district court, relying on Mesa Verde's payroll records, determined the composition of Mesa Verde's laborer and carpenter work forces at the various projects covered by its respective agreements with the unions. Based on these figures the district court concluded that Mesa Verde's work force was not permanent and stable but rather that Mesa Verde hired the unions on a job-by-job basis. The district court therefore granted Mesa Verde summary judgment, holding that its letters to the unions effectively repudiated its collective bargaining agreements with them as to projects started after the dates of repudiation.

We review the district court's grant of summary judgment de novo, to determine whether there are no genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Operating Eng'rs Pension Trust v. Beck Eng'g & Surveying Co.*, 746 F.2d 557, 561 (9th Cir.1984); Fed.R.Civ.P. 56(c).

A. *Project-by-Project Hiring*

The unions raise several objections to the district court's holding that Mesa Verde hired on a project-by-project basis. The Laborers contend a genuine, material issue of fact existed as to Mesa Verde's laborer work force composition during the relevant years and that summary judgment was therefore inappropriate. Both unions also argue that even assuming the correctness of the work force compositions the district court erred as a matter of law in holding that Mesa Verde hired on a project-by-project basis.

The Laborers argue that Mesa Verde's payroll records are unreliable and do not meet Mesa Verde's initial bur-

den of establishing the absence of any factual genuine issue as to the composition of its work force. *See generally British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir.1978) (initial burden of establishing no genuine factual issue lies with party moving for summary judgment), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979). We disagree. The payroll evidence is credible and, if uncontroverted by the Laborers with specific evidence, could lead to "but one reasonable conclusion" by the fact finder as to the composition of Mesa Verde's work force. *See generally Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (no genuine issue exists when there is "but one reasonable conclusion as to the verdict").

Because Mesa Verde established that no genuine factual issue existed as to its work force composition, the burden shifted to the Laborers to present "specific facts showing that such contradiction is possible." *British Airways*, 585 F.2d at 951. The Laborers' mere assertions in their legal memoranda were insufficient to meet this burden and establish a genuine factual issue. *Id.; S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir.1982).

The Laborers argue that they were unable to present specific evidence in opposition because the district court provided them insufficient time to complete discovery. We review the district court's decision to limit discovery for abuse of discretion. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 571, 88 L.Ed.2d 555 (1985) The discovery proceedings are described in the opinion of the district court, 602 F.Supp. at 328-30, and we do not recount them. Given the Laborers' access to the relevant documents at least during the district court's four-week discovery extension, and their failure to formally move the court under Fed.R.Civ.P. 56(f) for a further extension,

we cannot say that the district court abused its discretion in denying the Laborers further time to review the documents. The latter failure alone is a proper ground for denying discovery and proceeding to summary judgment. *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir.1986).[3]

The unions argue that even if the district court properly determined the work force compositions on summary judgment it erred in holding that Mesa Verde hired laborers and carpenters on a project-by-project basis. We agree with Judge Schwarzer's well-reasoned analysis that as a matter of law Mesa Verde's laborer work force was not permanent and stable. 598 F.Supp. at 1097-99; *see also KBR Elec.*, 812 F.2d at 498 (summary judgment resolving work force issue on uncontroverted facts). With regard to the Carpenters, the record shows that Mesa Verde employed 110 carpenters on 16 projects during the period from its first agreement with the Carpenters to its repudiation (August 1979 to May 8, 1984). Of the 110 carpenters, one worked on ten jobs; one worked on eight jobs; two worked on four jobs; four worked on three jobs; two worked on two jobs; and 100 worked on one job. These figures demonstrate a lack of significant carry-over of employees from project to project and the inconsistency in the identity of individuals employed by Mesa Verde at any given time. *See generally KBR Elec.*, 812 F.2d at 498; *Construction Erectors, Inc. v. NLRB*, 661 F.2d 801, 804 (9th Cir.1981); *Con-*

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[3] In a footnote in their opposition papers to Mesa Verde's summary judgment motion the Laborers requested an evidentiary hearing in the event the district court ruled against them. This conditional request does not constitute a proper Rule 56(f) motion. *Cf. Brae Transp.*, 790 F.2d at 1443 ("References in memoranda and declarations to a need for discovery do not qualify as motions under Rule 56(f)."). To permit the non-moving party a second bite at the apple to establish a genuine factual issue in the event the court finds no genuine issue of fact to exist would frustrate the purpose of the summary proceeding.

struction Erectors, Inc., 265 N.L.R.B. 786, 788 (1982); *Giordano Constr. Co.*, 256 N.L.RB. 47, 48 (1981).[4] This unstable work force does not possess "sufficient continuity as to merit continued reliance on showing of majority support for the union made at any point during the relevant period." *Construction Erectors, Inc.*, 265 N.L.R.B. at 787 & n. 11 ("relevant period" normally being the term of the collective bargaining agreement). The Carpenters' contention that it had the support of a majority of Mesa Verde's carpenters throughout the collective bargaining relationship does not affect Mesa Verde's status as job-by-job employer. *See New Mexico Dist. Council of Carpenters & Joiners v. Jordan & Nobles Constr. Co.*, 802 F.2d 1253 (10th Cir.1986) (employer hiring exclusively union workers is still job-by-job employer capable of repudiating pre-hire obligations as to future job sites); *see also Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421, 422 (1977).

The Carpenters attempt to point to a "core" group of carpenters employed by Mesa Verde during 1982. *See generally Constr. Erectors, Inc.*, 265 N.L.R.B. at 787-88 (a core group of employees moved by the employer from job to job and performing a substantial majority of the employer's work constitute a permanent and stable work force). Even assuming the appropriateness of isolating the work-force analysis to a single year of the agreement's term,[5] the group of employees identified by the

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[4] The NLRB decisions cited herein have been undermined by the NLRB's recent decision in *Deklewa v. International Association of Bridge Workers, Local 3*, 282 N.L.R.B. No. 184 (1987), which rejected the NLRB's prior approach of distinguishing between stable and unstable work forces in the pre-hire context. As we do not follow *Deklewa* but rather follow case law developed by this circuit and the NLRB prior to it, *see infra* section III(B), we find these previous NLRB decisions helpful in resolving the present work force issue.

[5] Relying on the existence of a core group of employees during one year and ignoring other years does not seem an accurate

Carpenters as working for Mesa Verde in 1982 was not a core group moving from job to job. The record cited by the Carpenters shows that of the five employees working on the five jobs in 1982, T. Sliger worked 38 hours on one job (with Lugo); Ayala worked 234 hours on one job; Landes worked 551 hours on one job; J. Sliger worked 896 hours on one job (with Lugo); and Lugo worked 1325 hours on three jobs (with T. Sliger on one job and with J. Sliger on another). As a matter of law, Mesa Verde's work force was not permanent and stable.

B. *Repudiation as to Future Projects*

Because Mesa Verde hired laborers and carpenters on a project-by-project basis, it was free to repudiate its collective bargaining agreements with the unions as to future projects. *See KBR Elec.*, 812 F.2d at 498. Its May 1984 letters to the unions therefore effectively relieved Mesa Verde of any contractual obligations to the unions on projects begun after the repudiation. *Id.* at 498-99 (party may repudiate a pre-hire agreement by giving other party actual or constructive notice of its intent not to be bound); *Endicott Enters.*, 806 F.2d at 922-23 (same).

The unions make several arguments against this conclusion. First, the Carpenters argue that the favorable working conditions obtained by Mesa Verde through the September 8, 1982 extension agreement both estopped it from repudiating its obligations and effected a waiver of its right to repudiate. We reject the contention that the terms of a pre-hire agreement, or the benefits gained by entering into it, can alone effect a waiver of a party's right to repudiate. Such a rule would, in effect, overrule our decisions recognizing the federal labor policy granting the right to repudiate and permitting repudiation of

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means of predicting majority support for the duration of the agreement and therefore is not a particularly appropriate method for characterizing a work force as permanent and stable.

pre-hire agreements notwithstanding termination clauses in the agreements to the contrary. *See, e.g., KBR Elec.*, 812 F.2d at 497 n. 1; *Beck Eng'g & Surveying Co.*, 746 F.2d at 566.

Second, the unions argue that even if Mesa Verde's work force was not permanent and stable, Mesa Verde could not repudiate its contractual obligations as to future projects because at the time of repudiation the majority of its carpenters and laborers working at its ongoing Hercules project supported the unions. This position is at odds with the above-stated rule that an employer hiring employees on a job-by-job basis may repudiate pre-hire contractual obligations as to future jobsites.[6]

Finally, the unions cite *Deklewa v. International Association of Bridge Workers, Local 3*, 282 N.L.R.B. No. 184 (1987), an NLRB decision entered after oral argument in this appeal. The NLRB in *Deklewa* overruled a number of its prior decisions and interpreted 29 U.S.C. § 158(f) to permit termination of a pre-hire collective bargaining relationship only upon expiration of the collective bargaining agreement or employee rejection of their collective bargaining representative in an NLRB-conducted election. The unions argue that while Mesa Verde repudiated its collective bargaining agreements neither of the *Deklewa* conditions has been met and that

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[6] The unions cite *V M Construction Co. v. Montalvo*, 241 N.L.R.B. 584, 584 nn. 1 & 2 (1979), which, though not entirely clear on the subject, could be interpreted as prohibiting a project-by-project employer from repudiating as to future projects when it has ongoing projects with union support. We, however, see no basis in law or policy for requiring a project-by-project employer to terminate ongoing projects in order to assert a statutory right to repudiate as to future projects. Of course, this right to repudiate as to future projects does not extend to ongoing projects at which the union enjoys majority support. Mesa Verde does not seek in the present action a declaration of its obligations to the unions with respect to the then ongoing Hercules project.

Mesa Verde therefore remains bound. Mesa Verde counters that the *Deklewa* decision applies retroactively only to matters pending before the NLRB and does not mandate retroactive application of its principles by the district court.

Were the law of this circuit a blank slate, we would defer to the NLRB's *Deklewa* decision if it presented a reasonable interpretation and application of the National Labor Relations Act. *See, e.g., NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 496, 105 S.Ct. 984, 988, 83 L.Ed.2d 986 (1985). The mere fact that the NLRB has changed its position on the pre-hire issue would not justify our de novo construction of the Act. *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 351, 98 S.Ct. 651, 660, 54 L.Ed.2d 586 (1978). However, the *Deklewa* decision stands in conflict with prior decisions of this court permitting an employer, absent majority support for the union in the appropriate bargaining unit, to repudiate pre-hire obligations by giving actual or constructive notice of its intent to terminate the agreement. Under *Royal Development Co. v. NLRB*, 703 F.2d 363, 369 (9th Cir.1983), we are not permitted to overrule prior panels' interpretations of the Act, even with intervening NLRB case law. The unions' argument under *Deklewa* should be addressed to the full court in a petition for rehearing en banc.[7]

CONCLUSION

The judgment of the district court is AFFIRMED.

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[7] The suitability of the *Royal Development* rule, which requires en banc consideration to implement many changes in NLRB decisional law, also may warrant the review of the court en banc.

NOONAN, Circuit Judge, concurring:

Deklewa v. International Association of Bridge Workers, Local 3, 282 NLRB 184 (1987), is a new and authoritative interpretation of Section 8(f). The Board rejects the judicial gloss on the statute which permitted parties to 8(f) agreements unilaterally to repudiate their agreements. The Board rejects the distinction between "permanent and stable" and "project by project" work forces.

The Board's interpretation is a reasonable interpretation and application of the National Labor Relations Act and is therefore entitled to deference. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 496, 105 S.Ct. 984, 988, 83 L.Ed.2d 986 (1985). The Board applied its new rules retroactively, and there is no reason that we should not follow this retroactive application. However, *Deklewa* is contrary to previous circuit law. The circuit should take the opportunity now to correct this law en banc in accordance with *Deklewa*. The old law is not only contrary to the present authoritative administrative interpretation of the National Labor Relations Act; it is also contrary to the federal preference for arbitration over litigation in the federal courts. The old law is also a judicial gloss on a statute that has the effect of derogating from normal principles of contract.

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C-84-4389-WWS

MESA VERDE CONSTRUCTION CO.,
Plaintiff,

v.

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS,
Defendant.

Feb. 11, 1985

Mark R. Thierman, Deborah E.G. Wilder, Thierman, Simpson & Cook, San Francisco, Cal., for plaintiff.

Victor J. Van Bourg, Van Bourg, Weinberg, Roger & Rosenfeld, San Francisco, Cal., for defendant.

ORDER

SCHWARZER, District Judge.

Defendant Northern California District Council of Laborers (the "Union") has moved, pursuant to Fed.R. Civ.P. 59(e) and 60(b), for alteration, amendment or vacation of this Court's order of December 13, 1984, 598 F.Supp. 1092, granting summary judgment in favor of Mesa Verde Construction Company ("Mesa Verde"). The Union seeks an order denying Mesa Verde's motion for summary judgment, without prejudice, and granting the Union an opportunity to conduct further discovery on the issue of whether or not Mesa Verde's payroll records demonstrate the existence of a core group of employees

for purposes of establishing a presumption of majority status. On January 5, 1985, the Union filed an amended motion for alteration, amendment or vacation of judgment, requesting this Court to reconsider three issues addressed by the December 13 order: 1) whether this Court had jurisdiction to determine majority status; 2) whether the 1980 agreement was a "pre-hire" agreement; 3) whether Mesa Verde could repudiate the agreement when it had an on-going project at the time of repudiation.

A. *Additional Discovery*

The Union argues that summary judgment was premature because a fact issue continues to exist as to whether or not available evidence shows the existence of a core group of employees in Mesa Verde's work force. According to the Union, it limited its analysis of majority status to the year 1981, rather than considering the the entire five year period covered by the agreements with Mesa Verde, because of the supposedly voluminous nature of Mesa Verde's payroll records. It argues that "there is a good possibility" that a core group of employees can be established for the year 1983 or by a combination of years.

A review of the proceedings is appropriate. On July 16, 1984, this Court stayed arbitration of a grievance filed by the Union pending resolution of Mesa Verde's declaratory relief action before this Court. During the argument, the Court asked counsel for the Union whether the case was ready for summary judgment. Counsel responded that there had not been adequate time in which to conduct discovery and therefore summary judgment at that time was improper. The Court then set September 28, 1984, as the date for summary judgment motions to allow time for discovery. The Union was given leave to engage in any needed discovery in the interim.

On August 21, 1984, the Union asked Mesa Verde to produce various payroll and personnel records for inspection and copying at the office of counsel for the Union on August 30, 1984. Mesa Verde agreed to produce payroll ledgers and trust fund reports for the period from June 20, 1980, to May 15, 1984, and to make these documents available for inspection at its corporate offices, but objected to any broader request. This discovery dispute was brought to the Court's attention on August 31, 1984, at the hearing on reconsideration of the order staying arbitration. Counsel for both sides agreed to try to settle the discovery dispute without the assistance of the Court, but their efforts proved unsuccessful.

On September 14, 1984, the Union filed its opposition to Mesa Verde's motion for summary judgment. It stated that it was unable to fully respond to Mesa Verde's allegations concerning majority status since Mesa Verde had failed to provide the Union with the necessary documents pursuant to its document request. At the hearing on the motion on September 28, the Court directed both sides to file supplemental memoranda on the issue of majority status by October 26, 1984. The Court further directed Mesa Verde to make available at Mesa Verde's corporate offices the documents requested by the Union and to have a copy machine available for the Union's use. The Union thus had four additional weeks to accomplish necessary discovery and prepare its supplemental memorandum.

On October 4, 1984, Union's counsel Paul Supton, accompanied by a law clerk, went to Mesa Verde's corporate offices and met with Mesa Verde's counsel. Payroll records and other relevant requested material for the entire five year period were produced. Supton has stated in a declaration filed with the Court that because of the voluminous nature of the material, he decided to limit his majority status analysis to the year 1981. The Union does not dispute that Supton and the law clerk spent only four hours at Mesa Verde's offices reviewing and copying this material.

The Union's attempt to suggest that it misunderstood the crucial issue in discovery to be whether laborers belonged to the union, rather than the stability of the work force, is disingenuous at best. In his letter of September 4, 1984, to counsel for Mesa Verde, Victor Van Bourg stated that items in the Union's discovery request were "clearly relevant to Plaintiff's claims that a stable work force never existed and/or that employees were not transferred from one jobsite to another." Thus counsel for the Union was well aware of the critical issue in this case when they made their decision to limit their examination of payroll records to 1981.

Counsel were of course also well aware that they could have sought additional time under Fed.R.Civ.P. 56(f). The Union concedes that it did not do so, but seeks to escape the consequences by relying on *Dieches v. Carpenters' Health and Welfare Fund of Philadelphia*, 572 F.Supp. 766 (D.N.J.1983), for the proposition that a court possesses the discretion to grant such a continuance despite a Rule 56(f) affidavit not having been filed. In *Deiches*, the plaintiff did not file a formal Rule 56(f) affidavit, but requested at oral argument that he be given an adequate opportunity to complete discovery and file affidavits. The Union here made no such request after having been twice afforded such an opportunity, first at the argument on July 16, 1984, and again at the argument on September 28, 1984. It could of course have made a further request at any time prior to December 13, 1984, when the Court issued its order on the summary judgment motions, but did not do so. The *Deiches* court noted, moreover, that "plaintiff's brief fairly implies that the [plaintiff] is not capable of responding to defendant's affidavits without such discovery." *Id.* at 776. By contrast, the Union asserted that it was entirely capable of responding to Mesa Verde's affidavits and statistics on the basis of the discovery conducted. In its Memorandum of Points and Authorities re Majority

Status, the Union stated in a footnote, "Defendant submits that the analysis of 1981 demonstrates conclusively that the Union attained majority status among the employer's work force in 1981 and is therefore entitled to a presumption of majority status through the life of the agreement." Memo at p. 16 n. 5.

The Union also claims that it preserved its right to further discovery in its October 26 memorandum (p. 16, n. 5). Buried at the end of a lengthy footnote devoted to the argument that the Union had gained majority status because Mesa Verde hired out of the Union hiring hall is a sentence stating that, "[i]f the Court disagrees, Defendant . . . submits that an evidentiary hearing should be conducted for a thorough analysis of the employer's other jobsites in 1982, 1983 and 1984."

That hardly can be construed to be a reservation of rights to renew discovery should the ruling be adverse on the motion. Moreover, such a reservation would be wholly inconsistent with Rule 56. Subsection (e) specifically requires that "[w]hen a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." Subsection (f) further provides that if the adverse party "cannot for reasons stated present . . . facts essential to his opposition, the court . . . may order a continuance to permit . . . discovery. . . ." It would be wholly contrary to the letter or spirit of Rule 56 to permit a party to engage in the kind of sandbagging proposed by counsel for the Union. The Rule does not entitle a party unsuccessful in opposing a motion for summary judgment motion to get a second crack at trying to prevail.[1]

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[1] The Court notes that neither now nor in its opposition to the motion prior to the ruling did the Union argue that there was a genuine issue as to any material fact. Their motion simply argues, without any factual support, that "there is a good possibility that

B. *Jurisdiction*

The Union asks the Court to reconsider whether it had jurisdiction to determine the issue of majority status. First, it argues that *Laborers Health & Welfare Trust Fund v. Kaufman & Broad of Northern Calif., Inc.*, 707 F.2d 412, 415-416 (9th Cir.1983) "simply has no application whatsoever to the instant case." The Union misreads the language of the Court's order. The point is not whether Mesa Verde is a Trust Fund as in *Kaufman*, but that the primary jurisdiction rule does not apply where a party has no standing to raise the issue before the National Labor Relations Board (NLRB). *Kaufman, supra.* This rule was extended In *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co.*, 746 F.2d 557 at 565 (9th Cir. Nov. 1, 1984), to apply to defenses which could not be presented to the NLRB. The defense raised by Mesa Verde to Union's charge of breach of a collective bargaining agreement is that the agreement was a voidable pre-hire agreement. The Trust Fund in *Beck* argued, as does the Union here, that a § 8(f) agreement may only be repudiated by means of an NLRB election pursuant to a petition filed by the employer. The court specifically found that it

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a core group of employees can be established. . . ." (Memo. Dec. 21, 1984, pp. 7-8).

The Union also argues that the summaries submitted by plaintiff were unreliable. (Reply Memo Jan. 25, 1985, p. 5) The Union directed these complaints at the summaries and the declaration of Peter Zearbaugh filed by plaintiff on July 10, 1984. Zearbaugh revised his summaries and submitted a Supplemental Declaration on September 20, 1984. The Union asserted in its Reply Memo that the revised summary also deserves no weight and that a determination of the nature of the work force can only be made "through complete and full discovery." (Reply Memo, p. 6). The Union was provided with such an opportunity for discovery, but limited its analysis to the year 1981. Therefore, Mesa Verde's work force data for the remaining years, upon which this Court relied in its ruling, have not been disputed.

would have been futile for Beck to have filed an election petition because the "NLRB will not certify or find appropriate a single person unit in a representation proceeding." *Id.* at 565. Similarly, it would have been futile for Mesa Verde to have filed an election petition since the NLRB cannot make a bargaining unit determination as to non-existent jobsites nor could an election be held.

Second, the Union attempts to rely on *Daniel Construction Co., Inc.*, 133 NLRB 264 (1961), to support the argument that where employees are hired on a jobsite by jobsite basis, the fact that the representation issue may involve "future jobsites" is irrelevant. *Daniel* does not address the issue of permanent and stable work force and hence is not relevant. In any event, the Union's quotations from it are out of context. It quotes *Daniel* as stating that the plumbers and pipefitters which were the subject of the agreement were hired by the employer "at the jobsites and terminated at the completion of the project," but has failed to quote the full sentence which states:

> While the various projects of the Greenville divisions vary in size and duration, *there is a nucleus of pipefitters and plumbers employed at all times.* These are hired at the jobsites and terminated at the completion of the project." (emphasis added)
>
> 133 NLRB at 265.

As the Court determined in its prior order, defendant failed to establish the existence of such a nucleus of employees here.

The arguments advanced by the Union are little more than an attempt to obfuscate the nature of § 8(f) agreements. There is an "undoubted right to repudiate a prehire agreement before the union attains majority support in the relevant unit. . . ." *Jim McNeff v. Todd*, 461 U.S. 260, 103 S.Ct. 1753, 1759, 75 L.Ed.2d 830 (1983).

It is also undisputed that a prehire agreement cannot be repudiated with respect to any job on which the union has a majority. The only issue in this case is whether Mesa Verde could repudiate it as to future jobs. The law is settled that the issue of majority status in that situation is not reached unless and until the employer is shown to have a stable and permanent work force. *Construction Erectors, Inc.*, 265 NLRB 786 (1982). Mesa Verde has shown that it did not, and the Union has come up with no facts to the contrary. Thus the issues raised by the Union concerning the Board's election procedures in the construction industry, including the determination of the appropriate bargaining unit for election purposes are never reached.

C. *Beyond the Scope of the Pleadings*

The Union requests the Court to reconsider its finding that, due to the absence of a permanent and stable work force, any binding collective bargaining relationship established at any jobsite under the 1979 agreement would have no effect on future jobsites. Order at 7. The Union argues that this finding goes beyond the scope of the pleadings and is not supported by record evidence; because Mesa Verde sought declaratory relief only as to the 1980 agreement, the Union did not conduct any discovery nor was any evidence presented with respect to the time period between the signing of the 1979 and 1980 agreements.

Why the Union raises this issue is obscure; the Court did not rely on the 1979 agreement but merely referred to and rejected an argument advanced by the Union. In its Memorandum of October 26, 1984, the Union stated:

> The instant litigation involves only the June 26, 1980, agreement, the agreement which Plaintiff purports to have repudiated and as to which Plaintiff seeks declaratory relief from this Court. However, as admitted by Plaintiff in its pleadings (see Sup-

> plemental Declaration of Peter Zearbaugh) Plaintiff had Laborer employees on its payroll in 1979 and was making Trust Fund contributions on behalf of those employees in 1979, prior to the signing of the agreement at issue in this case. Those contributions were made pursuant to the 1979 agreement with the Union. *Therefore, a collective bargaining relationship existed between these parties prior to the signing of the 1980 agreement.* (emphasis added).
>
> Memo at 6.

The Union's contention that no evidence was presented with respect to the period between the signing of the 1979 and 1980 agreements is belied by its own statement, quoted above, referring to Mesa Verde's analysis of laborers it employed from August, 1979, to June, 1980. In discovery, Mesa Verde provided pay roll records covering this period, and the Union reviewed them on October 4, 1984. It seems absurd for the Union, having raised the 1979 agreement and characterized it as a binding collective bargaining agreement, to argue that the Court went beyond the scope of the pleadings and the evidence in concluding that the 1979 agreements did not bind future jobsites.

D. *Timing of Repudiation*

The Union contends that the Court erred in its conclusion that repudiation was effective as to future jobsites, while being ineffective as to the ongoing Lucky Hercules project. It argues that an employer may not repudiate a pre-hire agreement at a time when the Union has attained majority status at any jobsite. Any attempt to repudiate during this time is ineffective as to both ongoing and future jobsites. (Memo Jan. 4, 1985, pp. 9 *et seq.*)

There is no support whatever for this argument in the cases cited or elsewhere, as the prior ruling shows.

The argument is based on misleading references to or quotations from cases. For example, in *Land Equipment, Inc.*, 248 NLRB 685, *enforced* 649 F.2d 867 (9th Cir. 1981), the NLRB specifically stated:

> The record further shows that the Respondent does not hire employees on a project-by-project basis but has a relatively stable complement of employees who move from job to job and who work between jobs in the Respondent's yard performing maintenance and oiling work. . . . [A]s described by the Administrative Law Judge, the Union achieved majority status in the appropriate unit on August 17, 1977. In such circumstances, the General Counsel did not have the burden of establishing majority support at each jobsite here. Cf. *Dee Cee Floor Covering Inc. and its alter ego and/or successor, Dagin-Akrab Floor Covering, Inc.*, 232 NLRB 421 (1977), and other cases where the employer hires employees on a project-by-project basis.
>
> 248 NLRB at 685 n. 2.

V M Construction Co., Inc., 241 NLRB 584 (1979) is also entirely distinguishable, as reflected in the Board's statement in the opinion:

> The repudiation in [*Dee Cee Flooring Covering, Inc.*] occurred between projects, when there was no employee on the payroll. In the present case, on the other hand, there not only were a payroll and a union majority at the time of repudiation, there was a union majority when the memorandum agreement was entered into, removing the situation from conventional 8(f) analysis. Beyond that, the appropriateness of a multiproject unit is established by the pleadings, obviating an assessment of majority at each project separately; by employee interchange among overlapping projects and carryover from completed to new projects; and by the nonsegregation, by project, of payroll records.
>
> *Id.* at 587.

The Union's contention is squarely contrary to the Ninth Circuit decision in *NLRB v. Pacific Erectors, Inc.*, 718 F.2d 1459 (9th Cir. 1983), *affirming Pacific Erectors, Inc.*, 256 NLRB 421 (1981). The court held that an employer who repudiated a pre-hire agreement during the course of a particular construction project continued to be bound by it on that project until its completion. The court stated that "where an employer has no stable work force and hires on a job-to-job basis" the union "must demonstrate its majority status at each new jobsite in order to invoke the provision of section 8(a)(5) of the Act." *Id.* at 1463. In *Pacific Erectors, Inc.*, the employer hired on a job-by-job basis and the union attained majority status at the Tualatin jobsite. The Board's ruling limits the employer's obligations under the agreement to that site. See *Pacific Erectors, Inc.*, 256 NLRB at 421-422.

For the reasons stated above, the Union's motion to alter, amend or vacate the Court's order of December 13, 1984, is denied.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C-84-4389-WWS

MESA VERDE CONSTRUCTION CO.,
Plaintiff,

v.

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS,
Defendant.

Dec. 13, 1984

Mark R. Thierman, Deborah E.G. Wilder, Thierman, Simpson & Cook, San Francisco, Cal., for plaintiff.

Victor J. Van Bourg, Van Bourg, Weinberg, Roger & Rosenbeld, San Francisco, Cal., for defendant.

ORDER

SCHWARZER, District Judge.

Plaintiff Mesa Verde Construction Company ("Mesa Verde") brings this action against Defendant Northern California District Council of Laborers ("the Union") seeking a declaration that it is not obligated to arbitrate a grievance under the terms of an agreement with the Union. Mesa Verde contends that the agreement was a pre-hire agreement within the meaning of § 8(f) of the National Labor Relations Act (the Act), 29 U.S.C.

§ 158(f) (1976)[1] and was repudiated before the date on which the grievance was filed.

FACTS

Mesa Verde has performed contracting work in California since June 1977. On August 13, 1979, it entered into a memorandum agreement with the Union. The memorandum agreement incorporated an industry master agreement which is not before the Court, and provided that it would remain in effect until June 15, 1980, and continue from year to year thereafter unless either party gave written notice of intention to change or cancel by April 15th. This agreement remained in effect until a second memorandum agreement was signed on June 26, 1980, incorporating by reference all of the terms and conditions of the 1980-83 Master Agreement between the Associated General Contractors of California, Inc. and the Northern California District of Laborers. This memorandum agreement provided that it would remain in full force and effect until June 15,

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[1] Section 8(f) provides in pertinent part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such an agreement. . . . *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for the clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

29 U.S.C. § 158(f).

1983, and continue from year to year thereafter unless either party gave written notice within the time provided in the agreement. On November 17, 1982, the terms of the June 1980 agreement were modified and extended to June 15, 1986. It is the June 1980 agreement which is the subject of this action.

The Master Agreement defined the scope of covered laborers' work and designated the counties to which it applied. That agreement also contained a union security clause requiring any employee on the job for more than eight days to join the Union.

On May 15, 1984, Mesa Verde's attorney sent a letter to the Union stating that Mesa Verde was abrogating "any and all agreements" with the Union. As of that date, Mesa Verde operated on only one jobsite, the Lucky Hercules Project. Thereafter, in June, 1984, the Union filed a grievance against Mesa Verde with respect to work at a different jobsite at Orland, California, after May 27, 1984.

Mesa Verde brings this action seeking relief in the form of a declaration that it is not obligated to arbitrate this grievance which arose at a new jobsite after its notice of termination. Jurisdiction is premised on § 301 of the Act. On July 16, 1984, this Court stayed arbitration of the grievance pending resolution of Mesa Verde's declaratory relief action. A motion to reconsider that stay was denied on August 31. Mesa Verde now moves for summary judgment. Inasmuch as no material facts are in dispute, disposition by summary judgment is appropriate.

DISCUSSION

Mesa Verde's motion and the Union's opposition raise three issues:

1. Was the agreement repudiated on May 15, 1984, a pre-hire agreement within the meaning of § 8(f)?

2. If the agreement was a pre-hire agreement, is this court a proper forum to determine whether the repudiation was effective?

3. If the court may make that determination, was the letter sent to the Union effective to repudiate the agreement?

I. *Was the Agreement a Pre-Hire Agreement?*

Mesa Verde asserts that it was free to repudiate the memorandum agreement because that agreement did not become a binding collective bargaining agreement but was only a voidable pre-hire agreement under § 8(f).

Although it is an unfair labor practice for an employer to sign a collective bargaining agreement recognizing a minority union as an exclusive bargaining representative, *International Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731, 737-39, 81 S.Ct. 1603, 1607-08, 6 L.Ed.2d 762 (1961), to accommodate the fluidity of construction industry employment, § 8(f) allows an employer in that industry to execute a pre-hire agreement before a majority is established. *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 103 S.Ct. 1753, 1756-57, 75 L.Ed.2d 830 (1983). While the statute by its terms does not provide for repudiation, the Supreme Court has held that parties may repudiate pre-hire agreements "until and unless such time as the union achieves majority support in the relevant bargaining unit" *Jim McNeff, Inc. v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Ironworkers*, 434 U.S. 335, 345, 98 S.Ct. 651, 657, 54 L.Ed.2d 586 (1978) ("*Higdon*"). Once a union achieves majority status, "the pre-hire agreement attains the status of a collective bargaining agreement executed by the employer with a union representing a majority of the employees in the unit." *Higdon*, 434 U.S. at 350, 98 S.Ct. at 660. Majority status thus converts a voidable § 8(f) agreement into a binding collective bargaining agreement under § 9(a).

A. *Jurisdiction*

The Union contends that before majority status can be ascertained, a determination of the appropriate bargaining unit must be made. The Union argues that the court is without jurisdiction to determine the appropriate bargaining unit and therefore cannot reach the question of majority status. It is true that "bargaining unit determination is a representational question reserved in the first instance to the Board . . . [and] a district court does not have jurisdiction to address this question in a section 301 suit." *Carpenters Local Union No. 1478 v. Stevens*, 743 F.2d 1271, at 1278 (9th Cir.1984). The primary jurisdiction rule, however, does not apply where the party raising the issue has no standing to raise it before the National Labor Relations Board. *Laborers Health & Welfare Trust Fund v. Kaufman & Broad of Northern California, Inc.*, 707 F.2d 412, 415-16 (9th Cir. 1983). This rationale was recently extended to defenses which cannot be presented to the Board. *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co.*, 746 F.2d 557, at 565 (9th Cir.1984).

The Union's argument is premised on the notion that effective repudiation of a pre-hire agreement can only follow a determination of the appropriate bargaining unit in connection with a representation election. The case before this Court, however, involves a repudiation as to future jobsites for which no laborers have yet been hired. No bargaining unit determination could be made with respect to non-existent jobs nor could an election be held. The Union's argument is therefore irrelevant.

B. *Majority Status*

Majority status sufficient to convert a voidable § 8(f) agreement into a binding § 9(a) agreement may be established in one of two ways:

> If the agreement covers a permanent and stable unit of employees, the contract is converted into a

> binding agreement covering all employees from the time the union establishes majority support. Once a majority of the company employees belong to the union, a rebuttable presumption of the union's majority status is created.
>
> If an employer has no stable workforce and hires on a job-to-job basis, "the employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites." *Higdon*, 434 U.S. at 845 [98 S.Ct. 657]. "The union must demonstrate its majority status at each new jobsite in order to invoke the provisions of section 8(a)(5) of the Act." *Construction Erectors, Inc. v. N.L.R.B.*, 661 F.2d 801, 804 (9th Cir.1981) (*citing Hageman Underground Construction*, 253 N.L.R.B. 60 (1980)).
>
> *N.L.R.B. v. Pacific Erectors, Inc.*, 718 F.2d 1459, 1463 (9th Cir.1983).

The Union makes three arguments. First, the Union argues that because it first entered into an agreement with Mesa Verde in 1979, the subsequent June 26, 1980, agreement was a part of an existing bargaining relationship and therefore could not be a pre-hire agreement. The National Labor Relations Board has held that the concept of a pre-hire agreement applies only to the initial § 8(f) agreement and not to succeeding contracts. See e.g. *Custom Sheet Metal and Service Co.*, 243 N.L.R.B. 1102 (1979); *Williams Enterprise, Inc.*, 212 N.L.R.B. 880 (1974), *enforced* 89 LRRM 2190 (4th Cir.1975); *Dallas Building & Construction Trades Council*, 164 N.L.R.B. 938 (1967), *enforced* 396 F.2d 677 (D.C.Cir.1968); *Bricklayers & Masons Local 3*, 162 N.L.R.B. 476 (1966), *enforced* 405 F.2d 469 (9th Cir.1968). Thus in *Bricklayers & Mason Local 3*, the Board enforced a collective bargaining agreement whose origin was a pre-hire agreement. The Board found this origin to be irrelevant in light of the subsequent dealings between the parties:

> It is apparent from the foregoing that the bargaining between the AGC and the Union presents the situation of a continuing bargaining relationship; a situation quite different from that which Congress had in mind when enacting Section 8(f)(1), to wit, an initial attempt by a union and an employer in the construction industry to commence such a relationship. Thus, the entire legislative history of Section 8(f)(1) is couched in terms of "prehire agreement," a reference which can have no meaning is the situation where, as here, the parties are continuing an existing bargaining relationship under which employees have previously been hired. 162 NLRB at 478

These cases, however, in which the Board determined that successive agreements could not be characterized as § 8(f) agreements, involved what *Pacific Editors* described as a permanent and stable workforce. But when an employer hires on a jobsite-by-jobsite basis, a § 8(f) agreement matures into a binding § 9(a) agreement only as to a jobsite on which the union attains majority status. *Id.* at 1463. In *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421 (1977), the Board noted that "the mere fact that the Union might indeed have represented a majority of the employees at Respondent Dee Cee's previous job sites is of no consequence inasmuch as the Union must demonstrate its majority at each new jobsite in order to invoke the provisions of § 8(a)(5) of the Act." *Id.* at 422. In the absence of a permanent stable workforce, therefore, any binding collective bargaining relationship established at any jobsite under the 1979 agreement between Mesa Verde and the Union could have no effect on future jobsites

Second, Mesa Verde argues that, even ignoring the 1979 agreement, the 1980 agreement could not have been a pre-hire agreement because at the time of its signing, the Union represented a majority of the laborers on the

Mesa Verde payroll. It is not disputed that in June 1980, ten laborers were on the payroll of whom seven were Union members. These ten men were employed on three different jobs: Job #150, Job #170 and Job #175; none worked at more than one job.

This argument must be rejected in light of the decision in *Acme Marble & Granite Co., Inc.* 271 N.L.R.B. No. 147 (August 9, 1984). There a cemetery developer performed approximately 30 to 40 jobs in 36 different states. The developer began a project in Missouri in September, 1976, and started another project in Kansas in October, 1976. On October 27, 1976, he entered into an agreement in western Missouri and Kansas with locals of the Laborers' International Union of North America. The developer adhered to the terms of the agreement as to the two jobsites, but refused to apply the agreement to a third job commenced after completion of the earlier two.

The Board rejected the argument that the Union had become a § 9(a) representative because on the date the contract was executed, the Union represented a majority of the developer's employees in the geographic area covered by the contract, noting that 'there is nothing in the Act to indicate that the Union's geographical jurisdiction establishes the bargaining unit." [2] It followed *Dee Cee*

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[2] The Board was persuaded by the developer's argument that Congress intended that each jobsite establishes the relevant unit. The developer relied on the following language from H.R.Rep. No. 741, 86th Cong., 1st Sess. 19 (1959), reprinted at [1959] U.S. Code Cong. & Admin. News 2318, 2441-2442; 1 Leg. Hist. 777:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.
>
> * * * *
>
> In the building and construction industry it is customary for employers to enter into collective-bargaining agreements for

Floor Covering, Inc., stating that the Union must demonstate majority status at each new jobsite regardless of majority status at previous projects. 232 N.L.R.B. at 422. Applying the *Acme Marble* analysis here, the Union's majority status at three different projects at the time of the June 26, 1980, agreement is irrelevant; the June 26, 1980, agreement remained a pre-hire agreement as to future jobsites.

Third, the Union argues that even if the agreement was a pre-hire agreement when it was signed, the Union attained majority status in 1981 in a stable and permanent workforce and was therefore entitled to a presumption of majority status for the life of the agreement. The Board has accorded a union achieving majority status in a permanent and stable workforce at any time during the term of the collective bargaining agreement an irrebuttable presumption of majority status for the duration of the agreement.[3] *Construction Erectors, Inc.*, 265 N.L.R.B. 786 (1982); *Hageman Underground Construction*, 253 N.L.R.B. 60 (1980). The Union relies on those decisions to support its argument.

In *Construction Erectors, Inc.*, the Board stated the test for determining whether a stable and permanent workforce exists, considering the special nature of the construction industry:

> [W]e believe it is important to emphasize that the determination of whether the workforce is "permanent and stable" is more than a mechanical exercise in tabulating the makeup, longevity, and fluctu-

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periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements sometimes apply to jobs which have not been started.

[3] The Ninth Circuit has recognized only a rebuttable presumption. *Precision Striping, Inc. v. NLRB*, 642 F.2d 1144 (9th Cir. 1981).

> ation of a group of employees. For in making the determination, the Board ultimately is deciding whether the workforce is of such a nature that a showing of majority support made at a particular point in time reasonably can be said to have significance at a subsequent time. In this regard, we do not require a showing that the workforce is a stable group of employees who work for a long period of time with no fluctuation in the overall unit. Indeed, in view of the special nature of the construction industry, such a requirement would virtually eliminate the possibility of finding a construction industry workforce that is "permanent and stable" . . . . In short, our analysis in cases of this nature must go beyond the calculation of numbers and dates and focus upon the issue of whether the employee complement possesses sufficient continuity as to merit continued reliance on showing of majority support for the union made at any point during the relevant period.
>
> *Id.* at 787 (footnotes omitted).

In *Construction Erectors, Inc.* the Board found a permanent and stable workforce on evidence that the company moved its ironworkers from job to job and did not hire them for a single job only. Of 47 ironworkers employed by the company, 15 worked for seven or more months on approximately 75% of the total number of days on which ironworkers were employed. The Board noted:

> [W]e rely particularly on the fact that throughout the relevant period, Respondent moved its employees from job to job and did not regularly assign employees to single jobs and then to no subsequent jobs. Thus, the instant case is readily distinguishable from those where employees are hired on a jobsite-by-jobsite basis with little or no carryover from job to job. In addition, we also find of sub-

> stantial significance the existence of a basic core group of employees utilized by Respondent throughout the relevant period. As noted, this group of employees worked approximately 75% of the total number of days on which ironworkers were employed and, again, moved from job to job.
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> *Id.* at 788.

In *Hageman Underground Construction, supra*, the Board also found a permanent and stable workforce. Hageman entered into a contract with the union in September, 1977, by which it agreed to recognize the union as the collective bargaining representative for its backhoe operators. Hageman complied with the terms of the contract until repudiation in March 1979. The company employed three backhoe operators who operated the company's four machines, but occasionally hired additional operators for brief period. Between October 1977 and April 1978, the three operators were transferred from job to job. The Board concluded that the union represented a majority of the employees in a permanent and stable workforce of backhoe operators:

> An examination of the record pertaining to the backhoe operators alone reveals that between October 1977 and April 1978, a substantial period during the contract, [one-third of the contract period], Respondent utilized a permanent and stable group of backhoe operators and did not generally hire on a project-by-project basis. In this regard, it is undisputed that [the three operators] operated backhoes for Respondent at various jobsites during this period and that they were not re-hired for each project. Rather, . . . these men were moved from project to project. . . . While [one of the operators] was terminated in April 1978, and . . . Respondent subsequently may have hired new backhoe operators as a result of turnover, there is no evidence suggesting

that Respondent ever abandoned its practice of using a stable complement to operate its four backhoes.

Id. at 62-63.

The Union argues that it attained majority status among a "stable and permanent workforce on a multi-site basis" in 1981, and thus is entitled to a presumption of majority status for the life of the agreement. It points out that in 1981, Mesa Verde had four main jobs on which it employed laborers: Jobs #200, #205, #210 and #230. At all these jobsites, the union represented a majority of the workers. Additionally, five of the six laborers who worked on job #200 were the five laborers on job #210.

Neither *Construction Erectors, Inc.* nor *Hageman Underground* support the Union's argument. The undisputed evidence compels the conclusion that the Union has failed to show sufficient continuity of employment to merit continued reliance on the asserted majority status. *Construction Erectors, Inc.*, 256 N.L.R.B. at 787. The ten months period during which five laborers were employed on both Jobs #200 and #210 represents less than one-fifth of the contract period (July 1980-May 1984). Moreover, the extent of overlap for three of the five employees was insignificant; one worked five hours on the second job, a second worked eight hours on the second job, and a third laborer worked 55 hours on the second job. Further, an examination of the over-all work performed during the contract period indicates that 48 laborers were employed on 11 different jobs. Of these 48 laborers, only 13 worked on more than one job; 11 worked on two jobs; only two worked on four jobs; and only one worked on six jobs. Unlike in *Construction Erectors, Inc.* and *Hageman Underground*, these statistics fail to show the existence of a core group of a significant portion of the total number of employees moving from project to project during a substantial period

of the contract. Rather they demonstrate that employees "are hired on a jobsite by jobsite basis with little or no carryover from job to job." *Construction Erectors, Inc.*, 265 N.L.R.B. at 788. Thus, at no time did the Union achieve a majority in a stable and permanent workforce sufficient to bind Mesa Verde under the agreement as to future jobsites.

C. *Timing of the Repudiation*

At the time that Mesa Verde abrogated the agreement on May 15, 1984, its Lucky Hercules Project was still in operation. Mesa Verde continued to make Trust Fund contributions after May 15, 1984, for laborers employed on that project. Mesa Verde argues that when a pre-hire agreement is abrogated and there is an ongoing project on which the union represents a majority of the employees, the employer must continue to comply with the collective bargaining agreement on that project until it is completed and the employees are terminated. The repudiation is effective, however, as to future jobsites. The Union rejects this argument and contends that Mesa Verde could not repudiate the agreement at a time when the Union had majority status on any jobsite.

Under *Dee Cee Floor Covering, Inc., supra*, however, a § 8(f) pre-hire agreement does not become enforceable until the union demonstrates majority status, and, in the case of a project-by-project employer, majority status must be separately demonstrated at each job site. Contrary to the Union's claim, the Board has not "cut back on its opinion in *Dee Cee Floor Covering*." Recent cases continue to make this distinction between project-by-project employers and those having a permanent and stable workforce, all citing *Dee Cee Floor Covering*. See *Acme Marble & Granite Co., Inc.*, 271 N.L.R.B. No. 147 (August 9, 1984); *Construction Erectors, Inc.*, 265 N.L.R.B. 786 (1982); *Giordano Construction Co.*, 256 N.L.R.B. 47 (1981); *Hageman Underground Construc-*

tion, 253 N.L.R.B. 60 (1980). The Ninth Circuit approved this rule in *N.L.R.B. v. Pacific Erectors, Inc.*, 718 F.2d 1459 (9th Cir.1983).

Inasmuch as a prehire agreement may be repudiated "until and unless such time as the union achieves majority status in the relevant unit," *Jim McNeff, Inc. v. Todd*, 103 S.Ct. at 1753-54, Mesa Verde, as a jobsite-by-jobsite employer, was entitled to repudiate its agreement as to all projects on which the Union had not then attained a majority. Under the decisions of the Board and the Ninth Circuit, in the absence of a permanent and stable workforce, each jobsite is assessed independently of every other jobsite. If the union has acquired majority status on a particular jobsite, the agreement becomes a binding collective bargaining agreement only as to that jobsite. Thus, Mesa Verde remained bound by the collective bargaining agreement on the Lucky Hercules Project but not on future jobsites. See also *Irvin-McKelvey Co.*, 194 N.L.R.B. 52 (1971), *enforced in part sub. nom. N.L.R.B. v. Irvin*, 475 F.2d 1265 (3d Cir.1973).

II. *Is this Court the Proper Forum to Determine Whether the Repudiation was Effective?*

Section 9 of the Mesa Verde-Union agreement provides that "any dispute concerning the interpretation or application of the agreement shall be submitted to arbitration." The Union argues that the scope of the clause is broad enough to encompass a claim of repudiation of the collective bargaining agreement and hence the issue must be decided in arbitration. It relies on the general rule stated in *California Trucking Association v. Brotherhood of Teamsters and Auto Truck Drivers Local 70*, 679 F.2d 1275, 1282 (9th Cir.1981), that "the issue whether repudiation has occurred must normally be submitted to arbitration when the contract calls for arbitral resolution of questions arising under the collective bargaining agreement."

The Union's argument ignores the "important distinctions between collective bargaining agreements and prehire agreements." *Northern California District Council of Laborers v. Robles Concrete Company*, 149 Cal.App. 3d 289, 293, 196 Cal.Rptr. 776 (1983). Mesa Verde's right to abrogate the agreement is based on a federal statute, not on a contractual provision. "An arbitrator is confined to interpretation and application of the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel and Car. Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). Since the issue of pre-hire agreement repudiation is statutory, rather than contractual, it is properly decided by the Court.

III. *Did the Letter Sent to the Union Repudiate the Agreement?*

Mesa Verde's attorney wrote to the Business Manager for the Union on May 15, 1984, informing him that Mesa Verde was abrogating "any and all labor contracts" with the Union. Mesa Verde contends that the letter was effective to repudiate the agreement. The Union argues that an election held under § 9 of the Act is the exclusive means by which a § 8(f) agreement may be repudiated.

The Supreme Court in *Jim McNeff, Inc. v. Todd*, *supra*, declined to decide what constitutes an effective repudiation of a § 8(f) prehire agreement. In a footnote, it stated:

> It is not necessary to decide in this case what specific acts would effect the repudiation of a pre-hire agreement—sending notice to the union, engaging in activity overtly and completely inconsistent with contractual obligations, or, as respondents suggest, precipitating a representation election pursuant to the final provision of § 8(f) that shows the union does not enjoy majority support.
>
> 103 S.Ct. at 1759 n. 11

The Ninth Circuit recently addressed the issue in the case of a single employee unit. *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co.*, 746 F.2d 557 (N.D.Cal.1984) The Trust there argued that a letter sent by the employer was not an effective means of repudiation. The court rejected the argument, noting that as a matter of long-standing policy, the Board will not certify or find appropriate a single-person bargaining unit for a representation election. *Id.* at 564: "Since the Board may not and will not ascertain majority status in a single-employee unit, it would be futile for the employer of a single employee to petition the Board for a representation election in order to repudiate his Section 8(f) pre-hire agreement. *Id.* Accordingly, a construction industry employer who employs a single employee pursuant to a § 8(f) agreement "is entitled to repudiate the agreement by conduct sufficient to put the union and the employee on notice that the agreement has been terminated." *Id.* The court concluded that the company's letter was sufficient to put the union and the only employee on notice that it considered the agreement terminated.

The reasoning in *Operating Engineers* controls here. It would have been futile for Mesa Verde to petition the Board for a representation election with respect to jobs which had not commenced and for which laborers had not yet been hired. Mesa Verde's conduct had only to be sufficient to put the union on notice that the agreement was terminated. *Id.* at 565. The letter announcing termination was clearly sufficient to do so.

For the reasons stated above, Mesa Verde's motion for summary judgment is granted.

IT IS SO ORDERED.

APPENDIX F

SUBCHAPTER IV—LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 158. UNFAIR LABOR PRACTICES

(b) Unfair labor practices by labor organization . . .

* * * *

(f) Agreements covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection

(a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office,

or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The Service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determinig whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)